Supreme Court, U.S.
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Nos. 86-939, 86-941

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ETSI PIPELINE PROJECT,
Petitioner,
v.
STATE OF MISSOURI, *et al.*,
Respondents.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,
v.
STATE OF MISSOURI, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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JOINT APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

No. 82-L-442

THE STATE OF MISSOURI, *et al.*,
Plaintiffs

v.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Defendants

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1982		
Aug 18	1	Complaint with request for injunctive and declaratory relief and request for place of trial at *Lincoln.*
		Summons issued—to Marshal.
Sep 3	2	Summons with returns
Sep 10	3	State of Missouri's request for waiver pursuant to local rule 5F.
	4	State of Iowa's request for waiver pursuant to local rule 5F.
Sep 13	5	*Order (WKU) admitting Robert M. Lindholm to practice* for this case only
	6	*Order (WKU) admitting Elizabeth M. Osenbaugh* to practice for this case only Copies mailed to attorneys Lindholm and Osenbaugh

DATE	NR.	PROCEEDINGS
1982		
Sep 21	7	Motion of Energy Transportation Systems Inc. to intervene
Sep 27	8	State of Missouri's request for waiver pursuant to local Rule 5F.
Oct 1	9	Entered Application and *Order (WKU) filed 9-29-82 admitting Curtis F. Thompson* to practice for this case only. Copy mailed to Curtis Thompson and Roderick Anderson.
	10	Motion of State of South Dakota to intervene as defendant and request for hearing with copy of answer attached
	11	Affidavit of William J. Janklow in support, with attachments
	12	Answer of State of South Dakota
	13	South Dakota's motion to file additional motions
Oct 1	14	Plaintiffs' response to motion of Energy Transportation Systems Inc. to intervene with request that proposed intervenor be required to comply with Rule 24(c)
Oct 8	15	Order (DLP) giving ETSI until 10-15-82 to file pleadings re motion #7 to intervene and giving plaintiff States until 10-25-82 to respond, etc. Copy mailed to counsel of record and counsel for ETSI
	16	Entered appearance of counsel for government, filed 10-6-82

DATE	NR.	PROCEEDINGS
1982		
Oct 12	17	Defendants' response to Energy Transportation Systems Inc.'s motion for intervention.
	18	Plaintiffs' motion for time to reply to motion of State of South Dakota to intervene
Oct 13	19	Proposed answer of intervenor-defendant ETSI, with attachment
	20	Order (DLP) giving plaintiffs until 10-28-82 to reply to motion to intervene by State of South Dakota and to file additional motions Copy mailed to counsel of record and counsel for ETSI
Oct 15	21	Federal Defendants' response to motion to intervene.
	22	Federal Defendants' answer.
Oct 20	23	Amended certificate of service of Answer by federal defendants
Oct 21	24	Federal Defendants' response to motion to consolidate.
Oct 26		Entered 2 pleadings, filed 10-25-82:
	25	Plaintiffs' motion for time to respond to ETSI's motion for intervention, with affidavit of G. Roderic Anderson attached
	26	Order (DLP) giving plaintiffs until 10-28-82 to respond to ETSI's motion to intervene Copy mailed to counsel of record and counsel for ETSI
Oct 28	27	Plaintiffs' opposition to motions of State of South Dakota and ETSI to intervene
	28	Plaintiffs' resistance to South Dakota's motion for leave to file additional motions
Oct 29	29	*Application and Order (WKU) for Daniel J. Doyle* to practice for this case Copy mailed to Mr. Doyle

DATE	NR.	PROCEEDINGS
1982		
	30	*Application and Order (WKU) for Curtis Glen Wilson* to practice for this case Copy mailed to Mr. Wilson
	31	*Application and Order (WKU) for Warren R. Neufeld* to practice for this case Copy mailed to Mr. Neufeld
Nov 1	32	Request of ETSI for oral argument on motion of intervention
	33	Plaintiffs' motion to file corrected opposition to State of South Dakota and ETSI motion to intervene, with attachments
Nov 2	34	Plaintiffs' response to motion to consolidate
Nov 4	35	Application and *Order (WKU) for Thomas J. Welk to practice for this case* Copy mailed to Mr. Welk
Nov 5	36	Motion of South Dakota to respond to plaintiffs' opposition to SD's motion for intervention
	37	Intervenor South Dakota's request for hearing on motion for intervention
Nov 8	38	Entered Order (DLP) filed 11-5-82 giving state of SD until 11-10-82 to submit reply brief re motion to intervene Copy mailed to counsel of record
Nov 15	39	South Dakota's certificate of service of brief re intervention
Nov 30		Entered 2 pleadings filed 11-29-82:
	40	Memorandum and Order (DLP) denying motion to file corrected substitute filing (#33), denying request for oral argument (#32); granting motion for intervention of ETSI (#7)

DATE	NR.	PROCEEDINGS
1982		
	41	Order (DLP) granting request of State of SD for oral argument on motion to intervene but denying request for evidentiary hearing; oral argument set for 12-13-83 at 9:00 a.m. Copies mailed to counsel of record
Dec 9	42	Motion of ETSI for continuance of oral argument
Dec 13	43	Entered Order (DLP), filed 12-10-82, continuing oral argument to 12-20-82 at 2:00 p.m. Copy mailed to counsel of record
Dec 16	44	Motion of Donn E. Davis for admission of William Linsenbard to practice for this case only
	45	Motion of Donn E. Davis for admission of James A. Hourihan, George U. Carneal and David J. Hayes to practice for this case only
Dec 20	46	*Order (DLP) admitting George U. Carneal to practice for this case only*
	47	*Order (DLP) admitting William E. Linsenbard to practice for this case only*
	48	*Order (DLP) admitting James A. Hourihan to practice for this case only*
	49	*ORDER (DLP) admitting David J. Hayes to practice for this case only*
	50	Courtroom minutes—before Magistrate Piester—hearing on motion to intervene of State of SD (#10)—submitted upon expiration of brief time Copies #'s 46, 47, 48 & 49 mailed to respective counsel and Attorney Donn Davis

DATE	NR.	PROCEEDINGS
1983		
Jan 13	51	Entered Memorandum and Order (DLP), filed 1-12-83, denying motions of South Dakota to intervene, #10, and to file additional motions, #13 Copy mailed to counsel of record
Jan 24	52	Motion of State of SD to appeal order of Magistrate of 1-12-83
Jan 25	53	Order (WKU) giving State of SD leave to appeal order of Magistrate by 1-25-83
	54	Appeal by State of SD to order of Magistrate of 1-12-83 Copies of #'s 53 and 54 mailed to counsel of record
Jan 27	55	Appeal by State of SD to order of Magistrate of 1-12-83
	56	Certificate of service
Feb 3	57	Energy Transportation Systems' motion for Judgment on the Pleadings, or, Partial Summary Judgment.
	58	Plaintiffs' Notice of Intention to file responsive brief re appeal.
Feb 15	59	Plaintiffs' notice of reliance upon facts not established by the pleadings
Feb 18	60	Plfs' motion for time to respond to ETSI's motion for judgment on the pleadings or for partial S. J., with attachments
	61	Plfs' interrogs to Corps of Engineers
	62	Plfs' interrogs to Dept. of Interior & Robert N. Broadbent
Feb 25	63	Order (WKU) granting plfs.' motion #60 for time to respond to ETSI's mot. for s.j. Copy mailed to counsel of record

DATE	NR.	PROCEEDINGS
1983		
Mar 1	64	Notice of State of South Dakota of withdrawal of motion to intervene and appeal from magistrate to court
	65	Motion of State of South Dakota to participate as amicus curiae
	66	Certificate of service of pleadings 64 & 65
Mar 4	67	Request of ETSI for scheduling conference
Mar 8	68	Entered Order (DLP) filed 3-7-83 giving plaintiffs to 3-11-83 to submit response to motion to consolidate with CV82-L-443 Copy mailed to all counsel of record
	69	Federal defendants' motion for reconsideration of court's order of 2-25-83
	70	Federal defendants' motion for protective order
	71	Federal defendants' motion for conference with the court
Mar 14	72	Memorandum and Order (DLP) consolidating with CV82-L-443 for trial; granting South Dakota's motion to participate amicus curiae (#65); setting preliminary conference 4-7-83 at 9:00 a.m. (#67 & #71) Copy mailed to all counsel of record
	73	Defendants' motion to dismiss
Mar 23	74	Entered ETSI's motion for reconsideration of order gr. pls addtl time to respond to motion for judgment on the pleadings or for partial S.J., filed 3-4-83.
Mar 24	75	Pl States' req. for time to respond to motion to dismiss of Federal dfs.
Mar 25	76	Fed. Dfs' renewed motion for Protective Order.

DATE	NR.	PROCEEDINGS
1983		
Apr 7	77	Memorandum and Order (WKU) denying renewed motion for protective order (#76) and denying motions for reconsideration (#69 and 74) Copy mailed to all counsel of record
	78	Order (WKU) giving plaintiffs until a date to be set by magistrate to respond to motion to dismiss (granting motion #75) Copy mailed to all counsel of record
Apr 8	79	Appearance of Marti, Dalton law firm for ETSI
Apr 15	80	Memorandum and Order (DLP) on preliminary pretrial held 4-8-83—discovery conference set 6-28-83 at 9:00 a.m. Copy mailed to all counsel of record.
Apr 22	81	Motion of state of North Dakota to appear as Amicus Curiae with affidavit of Allen I. Olson attached
	82	Certificate of Service
Apr 27	83	Certif. of service by St. of So. Dakota
	84	Entered fed. defs.' notice of serv. of ans. to interrogs, filed 4-26-83
May 2	85	Federal dfs' motion to limit discovery.
	86	Df Energy Transportation Systems' motion to limit discovery.
	87	Federal dfs' certified Index to Administrative Record.
May 9	88	Pls' response to request of North Dakota to appear as Amicus Curiae.

DATE	NR.	PROCEEDINGS
1983		
May 11	89	Entered Order (DLP) filed 5-10-83 that State of North Dakota may appear as an Amicus Curiae. Copy mailed to counsel of record.
	90	Plfs.' motion to compel discovery fm. federal defs. in CV82-L-443
	91	Aff. of Stephen E. Roady
May 12	92	Mot. of ETSI for time to respond to mot. of No. Dakota to appear as amicus curiae
May 16	93	Pls' motion for admission of Frederick S. Middleton to practice this case.
May 17	94	Plf. States' motion to compel ans. to interrogs. & for sanctions, w. aff. of G. Roderic Anderson
	95	Order (DLP) denying ETSI's motion #92 as moot Copy mailed to counsel of record
May 18	96	Application & *Order (DLP) admitting Frederick S. Middleton III to practice this case only* Copy mailed to Attys. Middleton & Confer
May 20	97	Motion of ETSI joining Federal Defendants' motion to dismiss
May 23	98	Entered Fed. Dfs' motion for leave to file reply memorandum filed 5-20-83.
May 23	99	Joint motion of all defendants for oral argument on defs' motions to dismiss
May 26	100	Federal defs.' response to plf. States' mot. to compel ans. to interrogs. & for sanctions
May 31	101	Order (WKU) granting motion #98, giving federal defendants leave to submit reply memorandum Copy mailed to all counsel of record

DATE	NR.	PROCEEDINGS
1983		
June 2	102	Motion of ETSI for leave to submit reply memo re plfs.' opposition to motion to limit discovery
June 3	103	Plfs.' in CV82-L-443 response to defs.' motion for oral argument
June 6	104	Plfs.' motion for admittance of Ellen M. Mahan to practice for this case only
June 7	105	Application & *Order (WKU) admitting Ellen M. Mahan to practice this case only* Copy mailed to Attys. Mahan & Confer
Jun 10	106	Appl. & *Order (WKU) admitting Mary Anne Sullivan to practice this case only* Copy mailed to Attys Sullivan & Bruckner
Jun 22	107	Plfs.' joint motion to direct federal defs. to give them timely access to record
Jun 23	108	Entered Order (DLP), filed 6-22-83, denying motion #107 as moot Copy mailed to counsel of record
Jun 24		Entered 2 pleadings, filed 6-23-83:
	109	Memorandum and Order (DLP) granting motions—to limit discovery—in part, filed federal defs. & ETSI, filings 85 & 86
	110	Memorandum and Order (DLP) granting in part motion of plf. states, #94, directing federal defs. to ans. interrogs. & for sanctions Copies mailed to counsel of record
Jul 1	111	Entered Memorandum and Order (DLP), filed 6-30-83, on disc. conf. 6-28-83-setting deadlines for filing motions, etc.—sch. final P.T. 1-31-84 at 9:00 a.m.—trial 2-13-84 at 9:00 a.m. as back-up to CV80-L-56 & CV75-L-96 Copy mailed to counsel of record

DATE	NR.	PROCEEDINGS
1983		
Jul 8	112	Pls' motion for clarification and reconsideration of 6-23-83 order.
Jul 11	113	Motion of K.C. So.RW to file suppl. resp. & aff. concerning standing
Aug 5	114	Pls' motion to compel answers to interrogatories with affidavit of Curtis F. Thompson attached.
Aug 8	115	Motion of Plaintiffs in CV82-L-443 to compel answers to interrogatories, with affidavit of Stephen E. Roady attached
Aug 11	116	Motion of Crosby, Guenzel law firm to withdraw as counsel for df ETSI
	117	Affidavit on Donn E. Davis in support of motion to withdraw
Aug 18	118	Pls' notice to take deposition
Aug 19	119	Memorandum & Order (DLP) granting motion for clarification (#112) Copy mailed to counsel of record
Aug 22	120	Federal dfs' motion for leave to file response to motion to compel ans. to interrogs
Aug 24	121	Order (DLP) that Crosby, Guenzel law firm may withdraw as counsel for df ETSI
Sep 2	122	Order (DLP) giving federal dfs time to file response (#120) Copy mailed to counsel of record
Sep 16	123	Df Energy Transportation Systems' 1st request for production
Sep 20	124	Order (DLP) that federal defendants submit copies of certain documents re discovery within 10 days, etc. Copy mailed to counsel of record

DATE	NR.	PROCEEDINGS
1983		
Oct 3	125	Pls' motion (in CV82-L-443) to serve more than 50 interrogs. upon df ETSI, w. attchmts
	126	Pls' notice of service of 1st set of interrogs. to ETSI, request to produce, motion #12
	127	ETSI's motion for production of documents utilized by pls' experts
Oct 4	128	Pls' motion (in CV82-L-443) to compel discovery, w. aff. of Stephen E. Roady & attchmts.
Oct 6	129	Df Energy Transportation System's certificate of service re discovery documents
Oct 11	130	Joint motion of federal defendants and Df ETSI for protective order
	131	Pls' motion (in CV82-L-443) for admission of non-resident attorney
Oct 12	132	Application & *Order (WKU) admitting William E. Walters III to practice this case only* Copy mailed to attorneys Walters and Confer
Oct 14		Entered 2 pleadings filed 10-13-83:
	133	Memorandum and Order (DLP) granting pls' motion #114 in part, federal dfs to produce certain documents within 15 days, etc. Copy mailed to all counsel of record
	134	Affidavit of Helena M. Troy in support of ETSI's motion for protective order
	135	Motion of federal dfs & ETSI to strike pls' submissions as to expert witnesses
	136	Federal dfs' motion for oral argument re discovery motions

DATE	NR.	PROCEEDINGS
1983		
	137	Federal dfs' motion for leave to submit suppl. memo in support of motion for protective order
Oct 17	138	Pl States' motion in CV82-L-442 for leave to amend complaint with copy attached
	139	Pls' motion in CV82-L-443 for leave to supplement and amend complaint with copy attached
Oct 19	140	Federal dfs' motion to file response to pls' motion to compel in CV82-L-443 out of time
Oct 21	141	Fed. dfs' motion for reconsideration of Magistrate's order of 10-13-83
	142	Memo & Order (DLP) *granting pls' motion in CV83-L-443 to serve more than 50 interrogs.* df ETSI's motion to produce, #127, in part, fed dfs' motion #137 to submit suppl. memo in support of motion for protective order & motion in CV82-L-443, to submit response to motion to compel, #144, out of time, etc. Copy mailed to counsel of record
Oct 25	143	Pls' motion for partial S. J.
	144	Pls' opposition to motions to dismiss & for partial S. J., etc.
	145	Pls' certificate of service
Oct 27		Entered 2 pleadings filed 10-26-83:
	146	Application and Order (WKU) *admitting Eliza Ovrom to practice for this case only*
	147	Application and Order (WKU) *admitting John P. Sarcone to practice for this case only* Copy of filings 146 & 147 mailed to Eliza Ovrom, John P. Sarcone and G. Roderic Anderson

DATE	NR.	PROCEEDINGS
1983		
Oct 28		Entered 2 pleadings filed 10-27-83:
	148	Pl States' adoption of motion of pl KCSI in CV82-L-443 to compel discovery with attachments
	149	Pl States' notice of filing of *depositions* of Richard D. Traylor, Ralph Miller, Frank E. Ellis, Terrence Martin and Lillian Stone in support
	150	Pls' motion in CV82-L-443 for partial S.J. with statement of material facts attached
	151	Pls' motion in CV82-L-443 to file opposition to dfs' motion to strike submissions as to expert witnesses out of time
Oct 31	152	Pls' motion to remand to Department of Interior for compilation & certification of administrative record
Nov 1	153	ETSI's motion for summary judgment
Nov 3	154	Pls' certificate of service of interrogatories and request for production to Energy Transportation
	155	Memo & Order (DPL) granting pls' motion to compel discovery (#132 in CV82-L-443) granting dfs' joint motion, #130, for protective order in part, and otherwise denying; and denying federal dfs' motion #136 for oral argument Copy mailed to counsel of record
	156	Attachment to pl states' memo in opposition to dfs' joint motion for protective order, filed at Magistrate's request in Memo & Order, #155
	157	Attachment to brief of pls in CV82-L-443 in opposition to dfs' joint motion for protective order, filed at Magistrate's request, etc.

DATE	NR.	PROCEEDINGS
1983		
	158	Attachment to suppl.memo of fed.dfs in support of dfs' mot. for protective order filed 10-11-83, filed at Magistrate's request, etc.
Nov 4	159	Pls' (in CV82-L-443) submission of affidavit of Rodney M. Confer re dfs' motion to strike pls' submissions as to experts, with attachment
Nov 7	160	Pls' certificate of service of pl States' 1st request for production
Nov 7	161	Affidavit of Rodney M. Confer, w. attchmts.
	162	Fed Dfs' motion for time to respond to motion by pl to remand
Nov 8	163	Memo & Order (DLP) denying dfs' motion to strike pls' submissions as to expert witnesses, #135, to certain extent w/o prejudice to its renewal, and in all other respects denying said motion Copy mailed to counsel of record
	164	Motion of ETSI for leave to submit reply brief re: dfs' motion to strike pls' submission as to expert witnesses, with attachment
Nov 10	165	Pls' certif. of service re response to ETSI's request for production, etc.
	166	K.C. So. Railway, et al's certif. of service of response & objections of pls in CV82-L-443 to ETSI's 2nd request for production, etc.
	167	Memo & Order (DLP) granting pls' motion #138 to amend complaint and motion #143 in CV82-L-443 to amend complaint, and giving parties to 11-18-83 to file same Copy mailed to counsel of record
Nov 14	168	Pls' motion in CV82-L-443 for partial reconsideration of court's order of 11-3-83 with Vols. 1 & 2 of Final Environmental Impact Statement attached

DATE	NR.	PROCEEDINGS
1983		
	169	Affidavit of Rodney M. Confer
	170	Affidavit of Rodney M. Confer, w. attchmts.
	171	Pl states' motion to reconsider order of 11-3-83
	172	Federal dfs' motion to review order of 11-3-83, w. attchmts.
Nov 15	173	Fed Dfs' second motion for protective order re pls' interrogs. to Robt. Burford, w. attchmts.
Nov 16	174	Order (DLP) granting fed dfs' motion #162 for time to respond to mot. to remand Copy mailed to counsel of record
Nov 18	175	Amended complaint with request for trial at *Lincoln*, w. certif. of service attch'd
	176	Pls' motion to obtain copies of indices to administrative record, w. aff. of Stephen E. Roady & attchmts.
	177	Pls' motion in CV82-L-443 for protective order re expert witnesses, w. aff. of Stephen E. Roady attch'd.
	178	Pls' motion in CV82-L-443 for continuance of discovery deadline & trial setting
Nov 21	179	Affidavit of Rodney M. Confer, with attchmts.
	180	Federal dfs' certif. of service of response to pls' request for admissions
	181	ETSI's motion for time to respond to motions for partial s.j. filed by pls
Nov 22	182	Memo & Order (DLP) giving pls time to submit applications for fees & expenses and briefs re discovery decided in order of 11-3-83 Copy mailed to counsel of record

DATE	NR.	PROCEEDINGS
1983		
	183	Pls' motion in CV82-L-443 for time to respond to fed dfs' appeal from order of 11-3-83
	184	Pls' motion (in CV82-L-442) to submit reply brief to federal dfs' response to pls' motion to remand
	185	Pls' motion for time to respond to motion for review
	186	Pls' certif. of service of motions #'s 184 & 185
Nov 23	187	Pls' certif. of service of interrogs. to fed. dfs & requests for production, etc.
Nov 25	188	Pls' certif. of service of third request for production to federal dfs
Nov 28	189	Certif. of service of response of amicus curiae So.Dakota to mots. for s.j.
	190	Order (WKU) granting federal dfs' 11-7-83 motion to file response (#162)
	191	Order (WKU) giving dfs time to file responses to motions of pls for partial S.J. (#181) and pls time to reply Copy of orders #190 & 191 mailed to counsel of record
Nov 29	192	Df ETSI's certificate of service re discovery documents
	193	Opposition of pls in CV82-L-443 to federal dfs' second motion for protective order re interrogatories to Bureau of Land Management
Nov 30	194	Entered Order (DLP) filed 11-29-83 rescheduling conference set for 11-29-83 to 12-5-83 at 1:30 p.m. Copy mailed to counsel of record

DATE	NR.	PROCEEDINGS
1983		
	195	Order (WKU) giving pls time to respond to motion for review of Magistrate's order of 11-3-83 (#185) Copy mailed to counsel of record
	196	Order (WKU) giving pls leave to submit reply brief to federal dfs' response to pls' motion to remand (#184) Copy mailed to counsel of record
	197	Pls' motion for time to respond to motions for partial s.j. filed by intervening df ETSI
Dec 1	198	Affidavit of Elizabeth M. Osenbaugh, w. attchmts.
	199	Df ETSI's motion to file opposition and reply memoranda
Dec 5	200	ETSI's certificate of service of answers to interrogatories and request for Production
	201	Pls' certificate of service of discovery documents
Dec 6	202	Affidavit of G. Roderic Anderson with exhibits
	203	Affidavit of G. Roderic Anderson
Dec 7	204	Pls' motion to amend Pretrial Order
	205	Affidavit of G. Roderic Anderson with exhibits attached
Dec 8	206	Entered Memorandum and Order (DLP) filed 12-7-83 on Discovery Conference held 12-5-83; granting pls' motion for continuance (#178 & 204) trial set 4-2-84 at 9:00 a.m. subject to disposition of CV80-L-56—exhibit conference set 3-22-84—final Pretrial set 3-22 and/or 3-23-84, with directions; granting in part pls' motion federal dfs provide indices

DATE	NR.	PROCEEDINGS
1983		
		to administrative record (#176); and granting pls' motion for time to respond to motion for partial S.J. (#197) Copy mailed to counsel of record
	207	Df ETSI's motion for reconsideration of 12-5-83 order continuing trial date
	208	Affidavit of Paul G. Doran
	209	Order (DLP) denying ETSI's motion for reconsideration (#207) Copy mailed to counsel of record
Dec 12	210	ETSI's motion for time to plead to amended complaint
Dec 15	211	Memo & Order (DLP) giving ETSI to 12-23-83 to file answers to amended complaint Copy mailed to counsel of record
Dec 19	212	Memo & Order (DLP) re telephone conference 12-14-83 re discovery matter Copy mailed to counsel of record
Dec 23	213	ETSI's answer to Amended Complaint, with attachments
	214	Memorandum and Order (DLP) granting Dfs' motion #141 in part, federal dfs to produce certain documents within 15 days Copy mailed to all counsel of record
Dec 27	215	Reporter's certificate of taking *deposition* of Craig Rupp in behlf. of pls
	216	Federal dfs' answer to amended complaint in CV82-L-442
	217	Federal dfs' answer to amendments & supplements to pls' second amended complaint in CV82-L-443

DATE	NR.	PROCEEDINGS
1983		
Dec 28	218	Memo & Order (DLP) granting pls' motion for reconsideration of magistrate's memo & order of 11-3-83, filing 171, etc. in CV82-L-442 & #164 in 82-L-443; and granting in part motion of pls in CV82-L-443 for partial reconsideration of court's order of 11-3-83, filing #161, etc. & #168 in 82-L-442 and pls in both cases ordered to reimburse dfs for costs in defending this mot including atty's fees Copy mailed to counsel of record
Dec 29	219	ETSI's motion for time to submit reply briefs
Dec 30	220	Order (DLP) granting motion #219
	221	Memo & Order (DLP) granting in part federal dfs' second motion, #173, for protective order re pls' interrogs. to Robert Burford; and federal dfs to reimburse pls for their costs re this motion, etc., and giving parties time to submit applications for expenses, etc. Copies mailed to counsel of record
	222	Federal dfs' appeal from magistrate's Memo & Order of 12-23-83
1984		
Jan 3	223	ETSI's notice of filing responses to railroad's request for documents
	224	Affidavit of Edward J. Wasp, with attachments
Jan 4	225	Federal dfs' certif. of service of response to pl states' 2nd interrogs.
	226	Entered reporter's certif., filed 1-3-84, of *deposition* of Nels Carlson in behalf of pls
	227	Court Reporter's certificate re deposition of *Raymond J. Supalla*

DATE	NR.	PROCEEDINGS
1984		
Jan 6	228	Pls' certificate of service of response to ETSI's req. for production
	229	Court Reporter's certificate re *deposition* of James F. Wiegand
Jan 10	230	Errata sheet for fed. dfs' reply to opposition by pls to fed. dfs' motion to dismiss
	231	Fed. dfs' appeal of magistrate's order (#221 in CV82-L-442 & #202 in 82-L-443)
Jan 11	232	Pl states' motion to file more than 50 interrogs. on df ETSI
	233	Pl states' motion to file more than 50 interrogs. on federal dfs
	234	Pl st. Mo's certif. of service of interrogs. to df ETSI
	235	Pl st. Mo's. certif. of service of interrogs. to federal dfs.
	236	Pl st. Mo's. certif. of service of req. for production to df ETSI
	237	Pl st. Mo's. certif. of service of req. for production to federal dfs.
	238	Pls' request to file cross-appeal of magistrate's order of 12-23-83
	239	Pls' statement of cross-appeal, w. certif. of service attch'd.
	240	Affidavit of Elizabeth M. Osenbaugh in support, with Appendix attached
Jan 16	241	Reporter's certif. of *deposition* of Robert Hallberg
	242	Federal dfs' certif. of service of response to request for production

DATE	NR.	PROCEEDINGS
1984		
	243	Federal dfs' certif. of service of response to 1st request for admission
	244	Federal dfs' certif. of service of response to 3rd request for production
	245	Federal dfs' certif. of service of response to 1st request to Robert Broadbent & Dept. of Interior for production, etc.
	246	ETSI's petition for recovery of costs in defending against pls' mot. for reconsideration, w. affidavit of David J. Hayes attached
Jan 19	247	Court Reporter's certification regarding *deposition* of David L. Watt
	248	Court Reporter's certification regarding *deposition* of George Gurr
Jan 24	249	Entered Order (WKU) filed 1-23-84 granting pls permission to file cross-appeal of memorandum and order of 12-23-83 (# 238) Copy mailed to all counsel of record
	250	Entered federal dfs' motion to modify magistrate's memo & order on disc. conf. filed 1-20-84
Jan 25	251	Df ETSI's notice of filing interrogatories concerning Identification of Witnesses with interrogatories attached
	252	Court Reporter's certificate re *deposition* of Charles Tulloss
Jan 26	253	Court Reporter's certificate re *deposition* of John F. Kennedy
	254	Court Reporter's certificate re *deposition* of Steven Jauron
Jan 27	255	Order (DLP) granting Fed. dfs' motion to modify (#250) and giving dfs 30 additional

DATE	NR.	PROCEEDINGS
1984		
		days to file administrative record with directions
		Copy mailed to counsel of record
Jan 30	256	Pls' motion to compel production with affidavit of Elizabeth M. Osenbaugh in support, affidavit of Elizabeth M. Osenbaugh re attachments, and attachments
	257	Court reporter's letter re *depositions* of David Williams, Bruce Blanchard, Lillian Stone and Terence Martin
Jan 31	258	Motion of pls in CV82-L-443 to compel discovery & for partial reconsideration court's order of 12-28-83, with affidavit of Rodney M. Confer and exhibits att
Feb 1	259	Motion of K.C. So. Railway, Sierra Club, and Ne., Iowa & Rocky Mt. Chapters of Nat'l. Farmers Union for s.j. on need for suppl. environmental impact statement, affidavit of Rodney M. Confer and attachments
	260	Statement of pls in CV82-L-443 concerning material facts to which exists no g issue re motion for s.j.
	261	Federal dfs & ETSI's motion to identify add'l potential witnesses
	262	Federal dfs & ETSI's motion for time to respond to interrogs.
	263	Motion of ETSI to compel discovery from pl in CV82-L-443
Feb 3	264	ETSI's notice of filing objection to interrogs. of pl states
Feb 8		Entered 2 pleadings filed 2-7-84:
	265	Federal dfs' motion for protective order re deposing of Michael J. Clinton and Darrell D. Mach, with affidavits in support

DATE	NR.	PROCEEDINGS
1984		
	266	Memorandum and Order (DLP) denying motion of df ETSI to submit reply memorandum (# 102); denying motion of K.C. So. Railway to file supplemental response (# 113); denying motion for protective order (# 177); granting motion to serve more than 50 interrogatories (# 232); granting motion to serve more 50 interrogatories (# 233); granting petition for costs (# 246) in part; and denying dfs' motion for time (# 262), etc. Copy mailed to all counsel of record
Feb 10	267	Entered Order (DLP), filed 2-9-84, denying w/o prejudice dfs' motion for protective order, # 265 Copy mailed to counsel
Feb 13	268	Memo (DLP) on telephone conference 2-10-84 re pending disagreement concerning scheduling of two depositions
	269	ETSI's notice of filing ans.to interrogs. of pl states
	270	Pl states' objections to ETSI's interrogs. concerning identification of witnesses
Feb 14	271	ETSI's certificate of service of response to States' motion for production
	272	Pls' certificate of service of objections and answers to ETSI's interrogatories concerning identification of witnesses in CV82-L-443
	273	Federal dfs certificate of service re response to joint request for production
	274	Federal dfs' certificate of service of response to pl states' request for production on federal dfs

DATE	NR.	PROCEEDINGS
1984		
Feb 15	275	Pl States' motion to compel production of documents served on January 10, 1984, with affidavit of Curtis F. Thompson and attachments
	276	Certificate of service of pls in CV82-L-443 of notice of depositions
Feb 15	277	Federal dfs' motion to compel pls to designate and produce witnesses & to shorten deposition notice time
	278	Federal dfs' certificate of service of objections to requests for admissions
	279	Federal dfs' certificate of service of response to interrogatories 14-39
Feb 16	280	Memorandum and Order (DLP) denying pls' motion to compel & for partial reconsideration (# 258), etc. Copy mailed to counsel of record
	281	Motion of pls in CV82-L-443 for protective order and for discovery conference
	282	Federal dfs' notice to take depositions
	283	Federal dfs' amended notice to take depositions
	284	Federal dfs' renewed motion for protective order re deposing of Michael J. Clinton and Darrell D. Mach, with attachments
Feb 17	285	Memorandum and Order (DLP) granting motion re additional potential witnesses (# 261) and setting motions conference 2-21-84 at 10:00 a.m. Copy mailed to all counsel of record
	286	Memorandum and Order (DLP) granting motion to compel production (# 256) and setting briefing schedule re sanctions Copy mailed to all counsel of record

DATE	NR.	PROCEEDINGS
1984		
	287	Pl states' motion for protective order re federal dfs' notice of oral deposition and opposition to federal dfs' motion to compel, w. affidavit of G. Roderic Anderson
	288	Order (DLP) granting in part motions to compel # 275 (any appeal to be filed by 2-24-84), to compel pls to designate witnesses & proceed with depositions # 277, for protective orders # 281 and # 287; renewed motion for protective order # 284 take under advisement Copy mailed to counsel
	289	ETSI's notice of filing response to pls' request for interrogatories
Feb 22	290	Federal dfs' response to pls' motion to compel production with attachments
Feb 23	291	Memorandum and Order (DLP) granting in part renewed motion for protective order (# 284) Copy mailed to counsel of record
	292	Affidavit of G. Roderic Anderson with exhibits attached
Feb 24	293	Motion of federal dfs for reconsideration and/or stay of magistrates orders of 2-17 & 21-84
	294	Appeal of magistrate's order of 2-21-84 denying pls' motion for protective order in CV82-L-443
	295	Affidavit of Rodney M. Confer in support, with attachment
Feb 27	296	Order (DLP) denying motion to reconsider order of 2-17-84 (part of # 293)
	297	Memorandum and Order (WKU) affirming Magistrate's order of 11-3-83 as modified and

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1984		
		otherwise denying appeal (# 172); and seting briefing schedule re sanctions Copy of 296 & 297 mailed to counsel of record
	298	Federal dfs' motion for protective order
Feb 28	299	Affidavit of G. Roderic Anderson and attachments in support of motion for s.j.
	300	Motion of pls in CV82-L-443 to compel deposition discovery and for sanctions
Feb 29	301	Federal dfs' response to pls' interrogatories Nos. 14-39
	302	Pl states' motion to compel answers to interrogatories Nos. 25-26 by federal dfs
	303	Pls' motion to compel responses to request for production from federal dfs with affidavit of Rodney M. Confer and attachments including copies of *deposition* of Steve Rothe and Duane Sveum
	304	Pls K.C. Southern Railway, Nebraska-Iowa-Rocky Mountain Farmers Union, and Sierra Club's appeal from magistrate's order re responses from ETSI to interrogatories on economic feasibility issue
Mar 1	305	Federal dfs' response to pls' supplemental motion for summary judgment
Mar 2	306	ETSI's notice of filing responses to pls' request for admissions in CV82-L-443
	307	ETSI's notice of filing response to pls' joint request for production
	308	Entered Memo & Order (WKU), filed 3-1-84, denying federal dfs' appeal of magistrate's order, #222, and pl states' cross-appeal of that same order, #'s 238 & 239 Copy mailed to counsel

DATE	NR.	PROCEEDINGS
1984		
Mar 2	309	Reporter's notice of taking deposition of *Steve Rothe* in behalf of pl St. of Mo.
	310	Reporter's notice of taking deposition of *Larry Hesse* in behalf of pl K.C. So
	311	Reporter's notice of taking deposition of *Laverne Horihan* in behalf of pl K.C. So
	312	Reporter's notice of taking deposition of *Ralph Miller* in behalf of St. of Mo.
	313	Reporter's notice of taking deposition of *Thomas Aude* in behalf of pl St. of Mo.
Mar 5	314	Pl states' motion for reconsideration of magistrate's memo & order of 2-23-84
	315	Affidavit of G. Roderic Anderson re federal dfs' response to 1st request for admission, with attachment
	316	Pl State of Iowa's application for expenses re motion to compel. # 256
	317	Affidavit of Elizabeth M. Osenbaugh in support
	318	Dfs' notice of service of interrogatories (to pl states) & response to requests for admissions
Mar 6	319	Pl State of Missouri's responses to federal dfs' interrogatories
	320	Pl States' motion to compel ETSI to answer interrogatories nos. 17, 29, 35, 37, 38, 39 & 40, with attachments including affidavits of Curtis F. Thompson and copy of *deposition* of Donald J. Miller
	321	Federal dfs' supplemental materials in support of motion for protective order with affidavits of Robert F. Burford and Garrey E. Carruthers attached

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1984		
Mar 7	322	Memo (WKU)
	323	Order (WKU) granting to extent federal dfs' and ETSI's motions to dismiss, #'s 73 and 97, and directing clerk to file certain documents in accordance with memo
	324	Documents filed in accordance with memo
	325	Memo & Order (WKU) denying federal dfs' appeal of magistrate's order of 12-30-83, # 231
	326	Memo & Order (WKU) denying pls' appeal of magistrate's order of 2-21-84, # 294 Copies of #'s 322, 323, 325 and 326 mailed to counsel
Mar 8	327	Pl State of Missouri's answer to interrogatory no. 12
Mar 9	328	Federal dfs' amended response to pl States' request for admissions no. 27
Mar 12	329	Entered Memorandum and Order (WKU) filed 3-9-84, affirming magistrate's order of 11-3-83 re imposition of fees and costs Copy mailed to all counsel of record
	330	Federal dfs' supplemental response to pl states' request for production, with attachments
	331	Motion of ETSI for withdrawal of counsel William Lisenbard
Mar 13	332	Affidavit of John W. Robinson re his deposition
	333	Affidavit of Donald Rex Hammer re his deposition
	334	Affidavit of William Samuel Masters re his deposition

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1984		
	335	Affidavit of Richard Bryan Pershall re his deposition
	336	Affidavit of Norman Stucky re his deposition
Mar 14	337	Entered Federal Dfs' notice of filing of administrative record & certifying affidavits, filed 3-12-84
	338	Certificate of service of motion of M. J. Bruckner to withdraw William Linsenbard as counsel
	339	Entered Federal Dfs' amended response to Pls' Interrogatories 14-39, filed 3-12-84
	340	Entered Federal Dfs' supplemental response to Pls' joint request for production, filed 3-12-84
Mar 15	341	Entered Federal Dfs' to Pls' motion to compel production, filed 3-13-84
Mar 15	342	Affidavit of G. Roderic Anderson with attachments in support of pls' motion for summary judgment
Mar 16	343	Entered Order (DLP) filed 3-15-84 giving William Linsenbard leave to withdraw as counsel for ETSI (#331) Copy mailed to all counsel of record
	344	Memorandum and Order (WKU) denying appeal of Magistrate's order (#304) Copy mailed to all counsel of record
Mar 19	345	*Deposition* of Avtar Singh Sandhu taken on behalf of K.C. Southern Railway, filed at direction of Magistrate
	346	*Deposition* of William Bernard Harris taken on behalf of K.C. Southern Railway, filed at direction of Magistrate

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1984		
	347	*Deposition* of Alan H. Plummer taken on behalf of K.C. Southern Railway, filed at direction of Magistrate
	348	Motion of Kansas City Southern to file amended complaint, or, for reconsideration of order of 3-7-84
	349	Submissions in support
	350	Memorandum and Order (DLP) denying motions to file oppositions (#151 & 199); to file reply brief (#164); to compel (#263, 300 & 303); for protective order (#298) for reconsideration #314); and awarding costs and attorney fees re motion #300, giving ETSI 10 days to file application and pls 10 days to respond Copy mailed to all counsel of record
	351	Affidavit of David J. Hayes with exhibits in support of pending motions of ETSI
	352	Letter certificate of court reporter re *depositions* of Frank Ellis and Lawrence G. Kline
Mar 21	353	ETSI's motion in limine to exclude introduction of duplicative testimony, with affidavit of David J. Hayes and *depositions* attached
	354	ETSI's motion in limine to exclude economic testimony offered by pls in 82-L-443 with affidavit of David J. Hayes and attachments
	355	ETSI's motion in limine to exclude evidence related to hypothetical future withdrawals of Missouri River water, with affidavit of David J. Hayes and attachment
	356	ETSI's motion in limine to exclude introduction of undisclosed expert evidence, with affidavit of David J. Hayes and attachments

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1984		
	357	ETSI's motion in limine to exclude introduction of legal testimony, with affidavit of David J. Hayes and copy of *depositions* of Ralph W. Johnson and Malcolm F. Baldwin
	358	Affidavit of David J. Hayes re States' motion to reconsider magistrate's order 2-23-84, with attachments
Mar 22	359	Affidavit of Curtis F. Thompson re motion to compel answers to interrogatories df ETSI
Mar 23	360	Pl K. C.'s motion for time to submit costs & fees re court's order of 3-9-84
Mar 26	361	Affidavit of Wayne L. Decker
	362	Submission of original affidavit of Malcolm F. Baldwin
	363	Submission of original affidavits of Dr. Thomas O. Claflin and Thomas P. Ballestero and clearer copy of Affidavit of Thomas S. Carter
Mar 27	364	Order (DLP) giving KCSR to 3-28-84 to submit itemized costs and fees (#360) Copy mailed to counsel of record
Mar 28	365	Entered Memorandum and Order (DLP) filed 3-27-84 denying motion to compel answers to interrogatories (#320) Copy mailed to counsel of record
	366	Aplication of KCSR and Nebraska, Iowa & Rocky Mountain Chapters for expenses re court's order of 3-9-84, with affidavit of Stephen E. Roady in support
	367	Statement of pls in CV82-L-443 of appeal of magistrate's order of 3-19-84, with attachments

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1984		
	368	Order (DLP) on pretrial conference held 3-22 and 3-23-84 Copy mailed to all counsel of record
Mar 29	369	Motion of State of Nebraska for time to deliver copies of exhibits to federal dfs with affidavit of G. Roderic Anderson in support
Mar 30	370	ETSI's showing in opposition to KCSR's motion to file amended complaint or for reconsideration, with attachments, including affidavits of Walter A. Hale, Avtar Singh Sandhu and Mary Anne Sullivan
Apr 2	371	Motion of pl States and KCSR for time to respond to ETSI's motion in limine with affidavit of G. Roderic Anderson in support
Apr 3	372	Motion of ETSI for reassignment to another judge, with affidavit of Paul G. Doran attached
	373	Certificate of court reporter re *deposition* of Duane Sveum
	374	Certificate of court reporter re *deposition* of John E. Velehradsky
Apr 4	375	Pls' motion in limine to exclude introduction of undisclosed expert evidence
	376	Pls' submission of affidavit with attachments in supoprt and in resistance to ETSI's motion in limine, no. 356
	377	State of Nebraska's withdrawal of motion for time (#369)
Apr 5	378	Pl States' motion for reconsideration of order denying motion to compel
	379	Affidavit of Thomas C. Sattler in support of pl K.C.'s response re opposition to motion to

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1984		
		file amended complaint, etc., with attachments
	380	Affidavit of Mary Anne Sullivan and copy of *deposition* of Malcolm F. Baldwin and his affidavit in support of motion for summary judgment
	381	ETSI's supplemental motion in limine to exclude Malcolm F. Baldwin as a witness
Apr 9	382	Entered Memo & Order (DPL), filed 4-6-84, setting schedule for submitting updated exhibit list, objections to designation of discovery documents, etc.—continuing P.T. to 5-4-84 at 9:00 a.m.
	383	Memo & Order (DLP) granting application of State of Iowa for expenses, etc. re pl states' motion to permit inspection, #316, and federal dfs to reimburse State of Iowa sum of $525—and denying pl states' motion to reconsider order of 3-27-84
	384	Order (WKU) granting pl states & K.C.'s motion for time, #371 Copies mailed to counsel
	385	ETSI's opposition to pls' appeal of magistrate's order of 3-19-84 denying motion to compel
Apr 17	386	Affidavit of David J. Hayes re motion in limine to exclude economic testimony, with attachments
	387	Affidavit of David J. Hayes re motion to exclude undisclosed expert evidence, with attachments
Apr 18	388	Entered Memorandum and Order (DLP) filed 4-17-84 denying motion to compel (#302) Copy mailed to counsel

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1984		
Apr 19	389	Affidavit of Eliza Ovrom, Asst. Attorney General, re pl's response to ETSI's motion in limine, with attachments
	390	ETSI's motion to file unauthorized reply re pl states' response to motion for reassignment to another judge, with attachment
Apr 23	391	Memo & Order (DLP) pls to submit to counsel for dfs revised statement of issues Copy mailed to counsel
Apr 26	392	States' request for leave to respond to ETSI's reply re motion in limine to exclude introduction of undisclosed expert evidence
May 3	393	Memorandum and Order (DLP) that pretrial conference set for 5-4-84 is canceled until further order of the Court Counsel called and copy mailed to counsel of record
	394	Motion of Pls in 82-L-443 to strike re Memo of Federal dfs in support of ETSI's motion for reassignment; and for sanctions
	395	Memorandum (WKU)
	396	Judgment (WKU) Permanently Enjoining defendants from performing the "Industrial Water Service Contract Between the United States and ETSI Pipeline Project, a Joint Venture" dated 7-6-82; ETSI's motion for S.J. and joint motions of Federal dfs and ETSI to dismiss denied as to Ct. I (#57) (#73 & 97); States motion for S.J. granted as to Ct I (#143) Copy of Memo & Order mailed to counsel of record
May 7	397	ETSI's motion for leave to serve brief exceeding 10 pages

DATE	NR.	PROCEEDINGS
1984		
May 8	398	KCS's motion to file amended complaint or for reconsideration of order with affidavits in support
May 14	399	Notice of Appeal of df U.S.A. with certificate of service on 5-14-84 Copy delivered to Paula Mahlman, Court Reporter, Room 589 Federal Bldg., 100 Centennial Mall Nort', Lincoln, NE 68508. Tel. (402) 477-7924
May 15	400	ETSI's response to KCS' brief with affidavit of Walter A. Hale in support
	401	ETSI's Notice of Appeal with certificate of service on 5-14-84 Copy delivered to Paula Mahlman, Court Reporter
May 22		Two certified copies of Notice of Appeal of df U.S.A. filed 5-14-84, of ETSI's Notice of Appeal filed 5-15-84, of District Court's Memorandum and Order filed 5-3-84, of KCS's motion to file amended complaint or for reconsideration of order filed 5-8-84, and of all docket entries to date mailed to Clerk, U. S. Court of Appeals. Copy of docket entries mailed to all counsel of record
May 25	402	Copy of Memorandum and Order (WKU) in CV82-L-443 granting in part and denying in part motions of KCSR for reconsideration and for leave to file amended complaint (#348 & 398 in 82-L-442)—reversing decision to dismiss railroad from Count XVII, and vacating earlier decision in regard to railroad on counts II, III, IV, VII, VIII, IX, X, and XVIII Copy mailed to counsel of record Two certified copies of last page of docket entries to date mailed to Court of Appeals

DATE	NR.	PROCEEDINGS
1984		
May 29	403	State of Nebraska's Notice of Cross-Appeal wth certificate of service on 5-29-84
	404	State of Iowa's Notice of Cross-Appeal with certificate of service on 5-29-84
	405	State of Missouri's Notice of Cross-Appeal with certificate of service on 5-29-84 Copy of filings 403, 404, & 405 delivered to Paula Mahlman, Court Reporter
Jun 4		Two certified copies of Notices of Cross-Appeal of State of Nebraska, State of Iowa, and State of Missouri filed 5-29-84, of District Court's Memoranda and Orders filed 3-7-84 and 5-25-84, and of all docket entries to date mailed to Clerk, U. S. Court of Appeals. Copy of last page of docket entries mailed to all counsel of record in CV82-L-442 and CV82-L-443
	406	Motion of Farmers Union for costs, attorneys' fees and expenses
Jun 5	407	Federal Df's designation of record joining ETSI's *joint appendix*
June 14	408	Court Reporter's certification regarding *deposition* of William L. Baxter
	409	Court Reporter's certification regarding *deposition* of James J. Carney
June 15	410	Amended notice of appeal by federal defendants with certificate of service on 6-15-84
Jun 18		Two certified copies of Amended notice of appeal by federal defendants and of last page of docket entries mailed to Court of Appeals
Jun 18	411	Federal defendants' amended designation of record

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1984		
	412	Federal defendants' amended designation of record Copy mailed to Court of Appeals with 2 certified copies of last page of docket entries
Jun 20	413	KCSR's motion for certification of 3-7-84 and 5-25-84 decisions for immediate appeal; and for entry of final judgment as to certain parts with affidavit in support and exhibits attached
Jun 25	414	Affidavit of John Stencel in support of the motion for fees and expenses of Farmers Union Two certified copies of last page of docket entries mailed to Court of Appeals
Jun 27	415	States' motion for certification of 3-7-84 decision as modified 5-25-84 for immediate appeal pursuant to 28 USC 1292(b)
	416	Affidavit in support with attachments
Jul 10	417	ETSI's response to motions for certification with affidavit attached
Jul 19	418	Affidavit of Eliza Ovrum in support of States' reply to Fed. Dfs' response to pls motion for certification with attachments
Jul 23	419	Federal dfs' motion for access to administrative record
Jul 27	420	Memo & Order (WKU) granting ETSI's motions to submit briefs exceeding ten pages (#397), railroad's motion for certification under 28 USC 1292(b) (#413); granting in part and denying in part States' motion for certification (#415); denying railroad's motion for entry of final judgment (#413); denying as moot States' motion for leave to

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1984		
		respond to ETSI's reply brief (#392), and motions to file reply briefs (#'s 390 & 392); and reserving ruling on motions of Sierra Club and Farmers Union chapters for attorneys' fees & costs (#406) pending determination of appeal of permanent injunction Copy mailed to counsel Two certified copies mailed to Michael Gans, Court of Appeals, with two certified copies of last page of docket entries to date
Aug 16	421	Entered Order (WKU) filed 8-15-84 granting Corps of Engineers access to Administrative Records (#419)
	422	Memorandum and Order (WKU) that U.S. shall pay pls KCSR and the Nebraska, Iowa & Rocky Mt. Farmers Union Chapters $1,000 and the pl State of Iowa $1,130 in expenses, including atty's fees (#366) Copy of filings 421 & 422 mailed to counsel of record
Oct 15	423	Copy of Order for Remand, U. S. Court of Appeals, to district court for consideration and determination of mootness, and retaining jurisdiction over appeals 84-1674 and 84-1675 pending determination, and directing order relating to mootness and any underlying record be certified to Circuit Court
Oct 17	424	Pls' submission of filings from Court of Appeals for consideration on issue of mootness and statement of intention to submit plan for limited discovery with affidavit of Rodney M. Confer attached and other attachments
Oct 18	425	Pls' supplemental submission of filings from Court of Appeals with attachments and affidavit of Rodney M. Confer attached

DATE	NR.	PROCEEDINGS
1984		
Oct 29	426	Pls' motion for leave to conduct limited discovery on issues of mootness & rip
Nov 2	427	Federal dfs' motion for time to respond to pls' motion to conduct limited disc
Nov 6	428	Order (WKU) granting federal dfs' motion #427 Copy mailed to counsel
Dec 5	429	Federal dfs' response to pls' motion to conduct limited discovery
Dec 10	430	Pls' motion to deny participation of amici, or, for time to submit brief
Dec 21	431	Order (WKU) denying motion to conduct discovery (#426); granting motion to deny participation of amici (#430); and setting evidentiary hearing on issue of mootness 12-28-84 at 9:00 a.m. Copy mailed to counsel
Dec 28	432	Courtroom Minutes—evidentiary hearing on issue of mootness—before Judge Urbom—oral argument set for 2-11-85 at 12:00 p.m.
	433	List of witnesses
	434	List of exhibits
1985		
Feb 6	435	Certif. of service of State of So. Dakota of memo in opposition to pls' motion to dismiss
Feb 7	436	Pls' motion to submit brief in excess of 10 pages on issue of mootness
	437	Affidavits of Eliza Ovrom and attachments including copy of *deposition* of Paul Doran on issue of mootness

DATE	NR.	PROCEEDINGS
1985		
Feb 8	438	Affidavits of M. J. Bruckner and Paul Doran re opposition of ETSI to motion to dismiss appeal as moot, with copy of *deposition* of Paul Doran and attachments
Feb 11	439	Order (WKU) giving Pls leave to submit brief in excess of 10 pages (#436) Copy delivered & mailed to counsel of record
	440	*Courtroom minutes*—hearing on issue of mootness—submitted
Feb 13	441	Entered Memorandum & Order (WKU), filed 2-12-85, that action is not moot Copy mailed to counsel of record and certified copy to Court of Appeals
Feb 28	442	Reporter's transcript of evidentiary hearing on 12-28-84
	443	Reporter's transcript of arguments on issue of mootness on 2-11-85
May 13	444	Copy of Order, U. S. Court of Appeals, Eighth Circuit, granting petitions for permission to appeal under 28 U.S.C. 1292(b) by KCSR, State of Iowa, Missouri, and Nebraska
Jul 25	445	Certified copy of Judgment, U. S. Court of Appeals, with copy of opinion attached, affirming District Court Judgment, with Appellees/Cross-appellants, States of Nebraska, Iowa, and Missouri to recover sum of $285.00 costs
	446	Certified copy of modification of opinion to include disposition in CV82-L-443 Copy of filings 445 & 446 mailed to counsel
Dec 17	447	Notice by Supreme Court of the U.S. of filing petition for certiorari
1987		
Mar 9	448	Notice of U.S. Supreme Court of filing petition for certiorari

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

No. 82-L-443

KANSAS CITY SOUTHERN RAILWAY COMPANY, *et al.*,
Plaintiffs

v.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Defendants

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1982		
Aug 18	1	Complaint with request for injunctive, mandatory and declaratory relief, and request for place of trial at *Lincoln.*
	2	Plaintiffs' motion for consolidation of CV82-L-443 and CV82-L-442.
	3	Plaintiffs' motion for temporary waiver of resident counsel. Summons issued to Federal defendants and to Energy Transportation Systems—to Marshal.
Aug 23	4	Entered Order (WKU), filed 8-20-82, granting plaintiffs' motion # 3 for temporary waiver of resident counsel requirement, and giving them 60 days to comply with requirements re obtaining of resident counsel Copy mailed to counsel of record
Sep 3	5	Summons with returns

DATE	NR.	PROCEEDINGS
1982		
	6	Return of summons on defendant Sisinyak
	7	Return of summons on defendant Andrews
	8	Summons with return
Sep 8	9	Defendant Energy Transportation's motion for time to plead
	10	Order (WKU) giving defendant ETSI to 10-18-82 to plead, or until time federal defendants plead Copy mailed to counsel of record
Sep 13	11	Defendant Energy Transportation's motion to defer ruling on plaintiffs' motion to consolidate
Sep 28	12	Entry of appearance of Rodney M. Confer as additional counsel for plaintiffs.
	13	Motion of Rodney M. Confer for admission of non-resident attorneys
Oct 1		Entered 4 pleadings filed 9-30-82:
	14	Application and *Order (WKU) admitting Brenda H. Kelley* to practice in this case only. Copy mailed to Brenda H. Kelley and Rodney Confer.
	15	Application and *Order (WKU) admitting Stephen E. Roady* to practice in this case only. Copy mailed to Stephen E. Roady and Rodney Confer.
	16	Application and *Order (WKU) admitting William B. Bonvillian* to practice in this case only. Copy mailed to William Bonvillian and Rodney Confer.

DATE	NR.	PROCEEDINGS
1982		
	17	Application and *Order (WKU) admitting Jon T. Brown* to practice in this case only. Copy mailed to Jon T. Brown and Rodney Confer.
Oct 1	18	Motion of State of South Dakota to intervene as defendant and request for hearing, with copy of answer attached
	19	Affidavit of William J. Janklow in support, with attachments
	20	Answer of State of South Dakota
	21	South Dakota's motion to file additional motions
Oct 7	22	First Amended Complaint, with request for trial at *Lincoln*
Oct 8	23	Praecipe for issuance of summons on added defendant Anne M. Gorsuch Summons issued-to Marshal
Oct 12	24	Plaintiffs' motion for time to respond to motions filed by State of South Dakota
Oct 14	25	Order (DLP) giving plaintiffs until 10-28-82 to respond to motions of State of South Dakota of 10-1-82 Copy mailed to counsel of record
Oct 15	26	Answer of ETSI to first amended complaint
	27	Answer of Federal defendants to first amended complaint
Oct 20	28	Amended certificate of service of Answer by federal defendants
Oct 21	29	Summons to Anne M. Gorsuch with return.
	30	Federal Defendants' response to motion to consolidate.

DATE	NR.	PROCEEDINGS
1982		
Oct 22	31	Motion of defendant Energy Transportation Systems to dismiss plaintiff Kansas City Southern Railway for lack of standing.
Oct 28	32	Plaintiffs' opposition to intervention by the State of South Dakota
	33	Plaintiffs' opposition to motion of State of South Dakota to file additional motions
Oct 29	34	Application and *Order (WKU) for Daniel J. Doyle to practice* for this case Copy mailed to Mr. Doyle
	35	Application and *Order (WKU) for Curtis Glen Wilson to practice* for this case Copy mailed to Mr. Wilson
	36	Application and *Order (WKU) for Warren R. Neufeld to practice* for this case Copy mailed to Mr. Neufeld
Nov 4	37	Application and *Order (WKU) for Thomas J. Welk* to practice for this case Copy mailed to Mr. Welk
Nov 5	38	Plaintiffs' notice to rely upon facts not appearing of record in opposition to motion to dismiss, and motion for time to respond to motion to dismiss, with affidavit of Rodney M. Confer attached
	39	Motion of South Dakota to respond to plaintiffs' opposition to SD's motion for intervention
	40	Intervenor SD's request for hearing on motion for intervention
Nov 8	41	Entered Order (DLP) filed 11-5-82 giving State of SD until 11-1-82 to submit reply brief re: motion to intervene Copy mailed to counsel of record

DATE	NR.	PROCEEDINGS
1982		
Nov 12	42	Order (WKU) granting plaintiffs' motion for time (# 38), giving plaintiffs to 12-1-82 to respond to motion of Defendant Energy Transportation Systems, Inc. to dismiss Kansas City Southern Railway Company as a plaintiff Copy mailed to all counsel of record
	43	Defendant Energy Transportation System's opposition to Kansas City Southern's request for time
Nov 15	44	South Dakota's certificate of service of brief re intervention
Nov 16	45	Plaintiff's opposition to South Dakota's request for hearing to clarify issues
Nov 17	46	Entered Federal Defendants' response to motion of State of So. Dakota to intervene filed 10-15-82.
Nov 18	47	Energy Transportation System's motion for reconsideration
Nov 19	48	Entered Order (WKU), filed 11-18-82, denying motion for reconsideration (# 47); order of November 10 to stand Copy mailed to all counsel of record
Nov 30	49	Entered Order (DLP) filed 11-29-82 granting request of State of SD for oral argument on its motion to intervene but denying request for evidentiary hearing, oral argument set 12-13-82 at 10:30 a.m. Copy mailed to counsel of record
Dec 1	50	Plaintiffs' opposition to motion of ETSI to dismiss KCS for lack of standing
Dec 9	51	Motion of ETSI for continuance of oral argument

DATE	NR.	PROCEEDINGS
1982		
Dec 13	52	Entered Order (DLP), filed 12-10-82, continuing oral argument until 12-20-82 at 3:30 p.m. Copy mailed to counsel of record
Dec 16	53	Motion of Donn E. Davis for admission of William Linsenbard to practice for this case only
	54	Motion of Donn E. Davis for admission of James A. Hourihan, George U. Carneal and David J. Hayes to practice for this case only
Dec 20	55	*Order (DLP) admitting George U. Carneal to practice* for this case only
	56	*Order (DLP) admitting William E. Linsenbard to practice* for this case only
	57	*Order (DLP) admitting James A. Hourihan to practice* for this case only
	58	*Order (DLP) admitting David J. Hayes to practice* for this case only
	59	Courtroom minutes—before Magistrate Piester—hearing on motion to intervene of State of SD (# 18)—submitted Copies #'s 55, 56, 57 & 58 mailed to respective counsel and Attorney Donn Davis
1983		
Jan 13	60	Entered Memorandum and Order (DLP), filed 1-12-83, denying motions of South Dakota to intervene, #18, and to file additional motions, # 21
Jan 24	61	Motion of State of SD to appeal order of Magistrate of 1-12-83
Jan 25	62	Order (WKU) giving State of SD leave to appeal order of Magistrate by 1-25-83

DATE	NR.	PROCEEDINGS
1983		
	63	Appeal by State of SD to order of Magistrate of 1-12-83 Copies of #'s 62 and 63 mailed to counsel of record
Jan 27	64	Appeal by State of SD to order of Magistrate of 1-12-83
	65	Certificate of service
Feb 2	66	Plaintiffs' notice of intent to rely upon facts not established by pleadings
Feb 3	67	Motion of ETSI for judgment on the pleadings, or, for partial summary judgment, with request for oral argument
Feb 14	68	Plaintiffs' notice of intention to rely upon facts not pleadings.
Feb 18	69	Plaintiffs' motion for time to respond to motion of ETSI for judgment on pleadings or partial summary judgment
Feb 24	70	Federal Dfs' motion to dismiss certain counts.
Feb 25	71	Plaintiffs' 1st request for production to Fed. dfs.
	72	Plaintiffs' 1st set of interrogatories to Fed. defs.
Mar 1	73	Notice of State of South Dakota of withdrawal of motion to intervene and appeal from magistrate to court
	74	Motion of State of South Dakota to participate as amicus curiae
	75	Certificate of service of pleadings 73 & 74
Mar 4	76	ETSI's motion for reconsideration of order gr. pls addtl time to respond to motion for judgment on the pleadings or on partial S. J.

DATE	NR.	PROCEEDINGS
1983		
	77	ETSI's request for scheduling conference
Mar 8		Entered 2 pleadings filed 3-7-83:
	78	Order (WKU) granting plaintiffs' motion # 69 for time to respond to ETSI's motion for s.j. etc. Copy mailed to all counsel of record
	79	Order (DLP) giving plaintiffs in CV82-L-442 to 3-11-83 to submit response to motion to consolidate Copy mailed to all counsel of record
	80	Plaintiffs' notice of intention to rely upon facts not appearing of record
	81	Federal defendants' motion for protective order
	82	Federal defendants' motion for conference with the court
Mar 11	83	Plaintiffs' motion for time to respond to Federal Dfs' motion to dismiss certain counts
Mar 14	84	Memorandum and Order (DLP) granting motion # 2, consolidating with CV82-L-442 for trial; granting South Dakota's motion to participate amicus curiae (# 74); setting preliminary conference 4-7-83 at 9:00 a.m. (# 77 & # 82) Copy mailed to all counsel of record
Mar 16	85	Entered Order (WKU) filed 3-15-83 granting plaintiffs' motion for time to respond to Federal dfs' motion to dismiss certain counts (# 83) Copy mailed to all counsel of record
Mar 21	86	Entered Memorandum and Order (DLP), filed 3-18-83, denying motion of federal defs. for protective order, # 81 Copy mailed to counsel of record

DATE	NR.	PROCEEDINGS
1983		
Mar 23		Removed filing # 76 filed in this case in error and placed in proper file.
Mar 25	87	Fed. Dfs' Notice of objection to intention to rely upon facts not established by pleadings.
	88	Fed. Dfs' renewed motion for Protective Order.
Apr 7	89	Memorandum and Order (WKU) denying renewed motion for protective order (# 88) Copy mailed to all counsel of record
Apr 8	90	Appearance of Marti, Dalton law firm for ETSI
Apr 15	91	Memorandum and Order (DLP) on preliminary pretrial held 4-8-83—discovery conference set 6-28-83 at 9:00 a.m. Copy mailed to all counsel of record.
Apr 22	92	Motion of State of North Dakota to appear as Amicus Curiae with affidavit of Allen I. Olson attached
	93	Certificate of Service
Apr 26	94	Notice of federal defs. of service of ans. to interrogs.
Apr 27	95	Certif. of service by St. of So. Dakota
May 2	96	Federal Dfs' motion to limit discovery.
	97	Df Energy Transportation Systems' motion to limit discovery. Federal dfs' certified Index to Administrative Record filed in CV82-L-442.
May 9	98	Pls' response to request of North Dakota to appear as amicus curiae.

DATE	NR.	PROCEEDINGS
1983		
May 11	99	Entered Order (DLP) filed 5-10-83 that State of North Dakota may appear as an Amicus Curiae. Copy mailed to counsel of record.
	100	Plfs.' mot. to compel disc. fm. fed. defs. (orig. filed in CV82-L-442)
	101	Aff. of Stephen E. Roady (orig. filed in CV82-L-442)
May 16	102	Pl's motion for admission of non-resident attorney (Frederick S. Middleton).
May 18	103	Applic. & *Ord. (DLP) admitting Frederick S. Middleton III to practice this case only* Copy mailed to Attys. Middleton & Confer
May 20	104	Motion of ETSI joining Federal Defendants' motion to dismiss
May 23	105	Joint motion of all defendants for oral argument on motions to dismiss
June 2	106	Motion of ETSI for leave to submit reply memo re plfs.' opposition to motion to limit discovery
June 3	107	Plfs.' response to defs.' motion for oral argument
June 6	108	Plfs.' motion for admittance of Ellen M. Mahan to practice for this case only
June 7	109	Application & Order *(WKU) admitting Ellen M. Mahan to practice this case only* Copy mailed to Attys. Mahan & Confer
Jun 10	110	Appl. & *Order (WKU) admitting Mary Anne Sullivan to practice this case only* Copy mailed to Attys. Sullivan & Bruckner
Jun 16	111	Fed. dfs' motion for leave to file reply brief re motion to dismiss.

DATE	NR.	PROCEEDINGS
1983		
Jun 20	112	Order (WKU) giving Fed. dfs. leave to submit reply brief re motion to dismiss (# 111) Copy mailed to all counsel of record
Jun 22	113	Plfs.' joint motion to direct federal defs. to give them timely access to record
Jun 23	114	Entered Order (DLP), filed 6-22-83, denying motion # 113 as moot Copy mailed to counsel of record
Jun 24		Entered 2 pleadings, filed 6-23-83:
	115	Memorandum and Order (DLP) granting in part motions to limit discovery filed by federal defs. & ETSI, filings 96 & 97
	116	Memorandum and Order (DLP) granting in part motion of plfs., # 100, for order compelling ans. to interrogs., with attachment Copies mailed to counsel of record.
Jul 1	117	Entered Memorandum and Order (DLP), filed 6-30-83, on disc. conf. 6-28-83—setting deadlines for filing motions, etc.—sch. final P.T. 1-31-84 at 9:00 a.m.—trial 2-13-84 at 9:00 a.m. as back-up to CV80-L-56 & CV75-L-96 Copy mailed to counsel of record
Jul 8	118	Pls' motion for clarification and reconsideration of 6-23-83 order.
Jul 11	119	Motion of K. C. So. RW to file suppl. resp. & aff. concerning standing
Aug 8	120	Pls' motion to compel answers to interrogatories with affidavit of Stephen Roady
Aug 11	121	Motion of Crosby, Guenzel law firm to withdraw as counsel for df ETSI
	122	Affidavit of Donn E. Davis in support of motion to withdraw

DATE	NR.	PROCEEDINGS
1983		
Aug 19	123	Memorandum & Order (DLP) granting motion for clarification (#118) Copy mailed to counsel of record
Aug 22	124	Federal dfs' mot. for leave to file response to mot. to compel answers to interrogs.
Aug 24	125	Order (DLP) that Crosby, Guenzel law firm may withdraw as counsel for df ETSI Copy mailed to counsel of record (# 121)
Sep 2	126	Order (DLP) giving federal dfs time to file response # 124 Copy mailed to counsel of record
Sep 16	127	Df Energy Transportation Systems' 1st request for production
Sep 20	128	Order (DLP) that federal dfs submit copies of certain documents re discovery within 10 days, etc. Copy mailed to counsel of record
Oct 3	129	Pls' motion to serve more than 50 interrogs. upon df ETSI, w. attachments.
	130	Pls' notice of service of 1st set of interrogs, etc. to ETSI
	131	ETSI's motion for production of documents utilized by pls' experts
Oct 4	132	Pls' motion to compel discovery, w. aff. of Stephen E. Roady & attchmts.
Oct 6	133	Df Energy Transportation Systems' certificate of service re discovery documents
Oct 11	134	Joint motion of federal defendants and Df ETSI for protective order
	135	Pls' motion for admission of non-resident attorney

DATE	NR.	PROCEEDINGS
1983		
Oct 13	136	Entered Application & *Order (WKU) filed 10-12-83 admitting William E. Walters to practice this case only* Copy mailed to attorneys Walters and Confer
Oct 14		Entered 2 pleadings filed 10-13-83:
	137	Memorandum and Order (DLP) granting plaintiffs' motion #120 in part, federal defendants to produce certain documents within 15 days, etc. Copy mailed to all counsel of record
	138	Affidavit of Helena M. Troy in support of ETSI's motion for protective order
	139	Motion of fed. dfs & ETSI to strike pls' submissions as to expert witnesses
	140	Fed. dfs' motion for oral argument re discovery motions
	141	Fed. dfs' motion for leave to submit suppl. memo in support of motion for protective order
Oct 17	142	Pl States' motion in CV82-L-442 for leave to amend complaint with copy attached
	143	Pls' motion in CV82-L-443 for leave to supplement and amend complaint with copy attached
Oct 19	144	Federal dfs' motion to file response to pls' motion to compel in CV82-L-443 out of time
Oct 21	145	Fed. dfs' motion for reconsideration of Magistrate's order of 10-13-83
	146	Memo & Order (DLP) granting pls' motion #129 to serve more than 50 interrogs.; df ETSI's motion, #131, to produce, in part; fed dfs' motion #141 to submit suppl memo

DATE	NR.	PROCEEDINGS
1983		
		in support of motion for protective order; & mot. #144 to submit response to pls' motion to compel out of time, etc. Copy mailed to counsel of record
Oct 28	147	Pls' motion for partial S.J. with statement of material facts attached
	148	Pls' motion to file opposition to dfs' motion to strike submissions as to expert witnesses out of time
Nov 1	149	ETSI's motion for summary judgment
Nov 3	150	Memo & Order (DLP) granting pls' motion to compel discovery, #132; granting dfs' joint motion, #134, for protective order in part, and otherwise denying; and denying federal dfs' motion #140 for oral argument Copy mailed to counsel of record
	151	Attachment to pl states' memo in opposition to dfs' joint motion for protective order, filed at Magistrate's request in Memo & Order, #150
	152	Attachment to brief of pls in CV82-L-443 in opposition to dfs' joint motion for protective order, filed at Magistrate's request, etc.
	153	Attachment to suppl. memo of fed dfs in support of dfs' mot. for protective order filed 10-11-83, filed at Magistrate's request, etc.
Nov 4	154	Pls' submission of affidavit of Rodney M. Confer re dfs' motion to strike pls' submissions as to experts, with attachment
Nov 7	155	Affidavit of Rodney M. Confer, w. attchmts.
	156	Fed dfs' motion for time to respond to motion by pl to remand

DATE	NR.	PROCEEDINGS
1983		
Nov 8	157	Memo & Order (DLP) denying dfs' motion to strike pls' submissions as to expert witnesses, #139, to certain extent w/o prejudice to its renewal, and in all other respects denying said motion Copy mailed to counsel of record
	158	Motion of ETSI for leave to submit reply brief re: dfs' motion to strike pls' submission as to expert witnesses, with attachment
Nov 9	159	K.C. So. Railway, et al's certif. of service of response & objections of pls to ETSI's 2nd req. for production, etc.
	160	Memo & Order (DLP) granting pls' motion #138 in CV82-L-442 to amend complaint and motion #143 to amend complaint, and giving parties to 11-18-83 to file same
Nov 14	161	Pls' motion (in CV82-L-443) for partial reconsideration of court's order of 11-3-83, with Vols 1 & 2 of Final Environmental Impact Stmt. attch'd. (filed in 82-442)
	162	Affidavit of Rodney M. Confer
	163	Affidavit of Rodney M. Confer, w. attchmts.
	164	Pl states' motion to reconsider order of 11-3-83
	165	Federal dfs' motion to review order of 11-3-83, w. attchmts.
Nov 15	166	Fed dfs' second motion for protective order re pls' interrogs. to Robt. Burford, w. attchmts.
Nov 16	167	Order (DLP) granting fed dfs' motion #156 for time to respond to mot. to remand Copy mailed to counsel of record

DATE	NR.	PROCEEDINGS
1983		
Nov 18	168	Second Amended Complaint with request for trial at *Lincoln*, w. certif. of serv. attchd.
	169	Pls' motion (in CV82-L-443) for protective order re expert witnesses, w. aff. of Stephen E. Roady attchd.
	170	Pls' motion (in CV82-L-443) for continuance of discovery deadline & trial setting
Nov 21	171	Affidavit of Rodney M. Confer, w. attchmts.
	172	Federal dfs' certif. of service of response to pls' request for admissions
	173	ETSI's motion for time to respond to motions for partial s.j. filed by pls
Nov 22	174	Memo & Order (DPL) giving pls' time to submit applications for fees, expenses & briefs re discovery decided in order of 11-3-83 (in CV82-L-443)
	175	Pls' motion (in CV82-L-443) for time to respond to fed dfs' appeal from order of 11-3-83
Nov 28	176	Certif. of service of response of amicus curiae So. Dakota to mots. for s.j.
	177	Order (WKU) granting federal dfs' 11-7-83 motion to file response (#156)
	178	Order (WKU) giving dfs time to file responses to motions of pls for partial S.J. (#173) and pls time to reply. Copy of orders #177 & 178 mailed to counsel of record
Nov 29	179	DF ETSI's certificate of service re discovery documents
	180	Opposition of pls to federal dfs' second motion for protective order concerning interrogatories to Bureau of Land Management

DATE	NR.	PROCEEDINGS
1983		
Nov 30	181	Entered Order (DLP) filed 11-29-83, rescheduling conference set for 11-29-83 to 12-5-83 at 1:30 p.m.
	182	Order (WKU) giving pls in CV82-L-442 time to respond to motion for review of Magistrate's order of 11-3-83 Copy of #181 and #182 mailed to counsel of record
	183	Motion of df ETSI for time to respond to motion of pl K. C. Southern Railway for protective order and continuance of trial
Dec 1	184	Df ETSI's motion to file opposition and reply memoranda
Dec 8	185	Entered Memorandum and Order (DLP) filed 12-7-83 on Discovery Conference held 12-5-83; granting pls' motion for continuance (#170) & trial set 4-2-84 at 9:00 a.m. subject to disposition of CV80-L-56—exhibit conference set 3-22-84 at 9:00 a.m.—final Pretrial set 3-22 and/or 3-23-84, with directions; ruling on pls' motion for protective order deferred Copy mailed to counsel of record
	186	Df ETSI's motion for reconsideration of 12-5-83 order continuing trial date
	187	Affidavit of Paul G. Doran
	188	Order (DLP) denying ETSI's motion for reconsideration (#186) Copy mailed to counsel of record
	189	ETSI's certif. of service of ans. to pls' 1st set of interrogs.
Dec 12	190	ETSI's motion for time to plead to amended complaint
	191	ETSI's certificate of service of responses to pls' 1st request for admissions

DATE	NR.	PROCEEDINGS
1983		
Dec 15	192	Memo & Order (DLP) giving ETSI to 12-23-83 to file answers to amended complaint Copy mailed to counsel of record
Dec 19	193	Memo & Order (DLP) re telephone conference 12-14-83 re discovery matter Copy mailed to counsel of record
Dec 23	194	ETSI's answer to second amended complaint, with attachments
	195	Memorandum and Order (DLP) granting dfs motion #145 in part, federal dfs to produce certain documents within 15 days Copy mailed to counsel of record
Dec 27	196	Reporter's certificate of taking *deposition* of Craig Rupp in behlf. of pls
	197	Federal dfs' answer to amended complaint in CV82-L-442
	198	Federal dfs' answer to amendments & supplements to pls' second amended complaint in CV82-L-443
Dec 28	199	Memo & Order (DLP) granting pls' motion for reconsideration of magistrate's memo & order of 11-3-83, filing 171, etc. in CV82-L-442 & #164 in 82-L-443; and granting in part motion of pls in CV82-L-443 for partial reconsideration of court's order of 11-3-83, filing #161 etc., and pls in both cases ordered to reimburse dfs for costs in defending this motion, including atty's fees Copy mailed to counsel of record
Dec 29	200	ETSI's motion for time to submit reply briefs
Dec 30	201	Order (DLP) granting motion #200

DATE	NR.	PROCEEDINGS
1983		
	202	Memo & Order (DLP) granting in part federal dfs' second motion, #166, for protective order re pls' interrogs. to Robert Burford; & federal dfs to reimburse pls for costs re this motion, etc., & giving parties time to submit applic. for expenses Copies mailed to counsel of record
Dec 30	203	Federal dfs' appeal from magistrate's Memo & Order of 12-23-83
1984		
Jan 3	204	ETSI's notice of filing responses to railroad's request for documents
	205	Affidavits of Edward J. Wasp, with attachments
Jan 4	206	Federal dfs' certif. of service of response to pl states' 2nd interrogs.
	207	Entered reporter's certif., filed 1-3-84, of *deposition* of Nels Carlson in behlf. of pls.
	208	Court Reporter's certificate re deposition of Raymond J. Supalla
Jan 6	209	State of MO's certificate of service of response to ETSI's req for production
	210	Court Reporter's certificate re *deposition* of James F. Wiegand
Jan 10	211	Errata sheet for fed. dfs' reply to opposition by pls to fed. dfs' mot. to dismiss
	212	Fed dfs' appeal of magistrate's order of 12-30-83
Jan 11	213	Pl states' motion to file more than 50 interrogs. on df ETSI

DATE	NR.	PROCEEDINGS
1984		
	214	Pl states' motion to file more than 50 interrogs. on fed. dfs
	215	Pl st. Mo's certif. of service of interrogs. to df ETSI
	216	Pl st. Mo's certif. of service of interrogs. to fed. dfs
	217	Pl st. Mo's certif. of service of req. for production to df ETSI
	218	Pl st. Mo's certif. of service of req. for production to fed dfs
	219	Pls' request to file cross-appeal of magistrate's order of 12-23-83
	220	Pls' statement of cross-appeal, w. certif. of service attch'd.
	221	Affidavit of Elizabeth M. Osenbaugh in support, with Appendix attached
Jan 16	222	Reporter's certif. of *deposition* of Robert Hallberg
	223	Federal dfs' certif. of service of response to request for production
	224	Federal dfs' certif. of service of response to 1st request for admission
	225	Federal dfs' certif. of service of response to 3rd request for production
	226	Federal dfs' certif. of service of response to 1st request to Robert Broadbent & Dept. of Interior for production, etc.
	227	ETSI's petition for recovery of costs in defending against pls' mot. for reconsideration, w. affidavit of David J. Hayes attch'd.

DATE	NR.	PROCEEDINGS
1984		
Jan 19	228	Court Reporter's certification regarding *deposition* of David L. Watt
	229	Court Reporter's certification regarding *deposition* of George Gurr
Jan 24	230	Entered Order (WKU) filed 1-23-84 granting pls request #129 to file cross-appeal of memorandum and order of 12-23-83 Copy mailed to all counsel of record
	231	Entered federal dfs' motion to modify magistrate's memo & order on discovery conference 12-7-83, filed 1-20-84
Jan 25	232	Df ETSI's notice of filing interrogatories concerning Identification of Witnesses with interrogatories attached
	233	Court Reporter's certificate re *deposition* of Charles Tulloss
Jan 26	234	Court Reporter's certificate re *deposition* of John F. Kennedy
	235	Court Reporter's certificate re *deposition* of Steven Jauron
Jan 27	236	Order (DLP) granting Fed. dfs' motion to modify (# 231) and giving dfs 30 additional days to file administrative record with directions Copy mailed to counsel of record
Jan 30	237	Court reporter's letter re depositions of David Williams, Bruce Blanchard, Lillian Stone and Terence Martin
Jan 31	238	Motion of pls (in CV82-L-443) to compel discovery & for partial reconsideration of court's order of 12-28-83, with affidavit of Rodney M. Confer and exhibits attch

DATE	NR.	PROCEEDINGS
1984		
Feb 1	239	Motion of K. C. So. Railway, Sierra Club, and Ne., Iowa & Rocky Mt. Chapters of Nat'l. Farmers Union for s.j. on need for suppl. environmental impact statement, affidavit of Rodney M. Confer and attachments
	240	Statement of pls in CV82-L-443 concerning material facts to which exists no genuine issue re motion for s.j.
	241	Federal dfs & ETSI's motion to identify add'l. potential witnesses
	242	Federal dfs & ETSI's motion for time to respond to interrogs.
	243	Motion of ETSI to compel discovery from pl (in CV82-L-443)
Feb 3	244	ETSI's notice of filing objections to interrogs. of pl states
Feb 8		Entered 2 pleadings filed 2-7-84:
	245	Federal dfs' motion for protective order re deposing of Michael J. Clinton and Darrell D. Mach, with affidavits in support
	246	Memorandum and Order (DLP) denying motion of df ETSI to submit reply memorandum (# 106); denying motion of K.C. So. Railway to file supplemental response (# 119); denying motion for protective order (#169); denying ETSI's motion for time (# 183); granting motion to serve more than 50 interrogatories (# 213); granting motion to serve more than 50 interrogatories (# 214); granting petition for costs (# 227) in part; and denying dfs' motion for time (# 242), etc. Copy mailed to all counsel of record

DATE	NR.	PROCEEDINGS
1984		
Feb 10	247	Entered Order (DLP), filed 2-9-84, denying w/o prejudice dfs' motion (#245) for protective order Copy mailed to counsel
Feb 13	248	Memo (DLP) on telephone conference 2-10-84 re pending disagreement concerning scheduling of two depositions Copy mailed to counsel
	249	ETSI's notice of filing answers to interrogs. of pl states
Feb 14	250	ETSI's certificate of service of response to States' motion for production
	251	Pls' certificate of service of objections and answers to ETSI's interrogatories concerning identification of witnesses in CV82-L-443
	252	Fed dfs' certificate of service of response to pl's joint request for production
	253	Federal dfs' certificate of service in response to pl states' request for production on federal dfs
Feb 15	254	Pl states' motion to compel production of documents served 1-10-84, with affidavit of Curtis F. Thompson and attachments
	255	Certificate of service of pls in CV82-L-443 of notice of depositions
Feb 15	256	Federal dfs' motion to compel pls to designate and produce witnesses & to shorten deposition notice time
	257	Federal dfs' certificate of service of response to interrogatories 14-39
Feb 16	258	Memorandum & Order (DLP) denying pls' motion to compel & for partial reconsidera-

DATE	NR.	PROCEEDINGS
1984		
		tion (# 238), pls to reimburse dfs for costs in defending motion, etc. Copy mailed to counsel of record
	259	Pls' motion for protective order and for discovery conference
	260	Federal dfs' notice to take depositions
	261	Federal dfs' amended notice to take depositions
	262	Federal dfs' renewed motion for protective order re deposition of Michael J. Clinton and Darrell D. Mach, with attachments
Feb 17	263	Memorandum and Order (DLP) granting motion re additional witnesses (#241); and setting motions conference 2-21-84 at 10:00 a.m. Copy mailed to all counsel of record
Feb 21	264	Pl states' motion for protective order re federal dfs' notice of oral depositions, and opposition to federal dfs' motion to compel, w. affidavit of G. Roderic Anderson
	265	Order (DLP) granting in part motions to compel #254 (any appeal to be filed by 2-24-84), to compel pls to designate witnesses and proceed with depositions # 256, and for protective orders, #'s 259 & 264; renewed motion for protective order # 262 taken under advisement Copy mailed to counsel
	266	ETSI's notice of filing response to pls' request for interrogatories
Feb 22	267	Federal dfs' response to pls' motion to compel production with attachments

DATE	NR.	PROCEEDINGS
1984		
Feb 23	268	Memorandum and Order (DLP) granting in part renewed motion for protective order (# 262) Copy mailed to counsel of record
Feb 24	269	Appeal of magistrate's order of 2-21-84 denying pls' motion for protective order
	270	Affidavit of Rodney M. Confer in support, with attachment
Feb 27	271	Memorandum and Order (WKU) affirming Magistrate's order of 11-3-83 as modified and otherwise denying appeal (# 165); and setting briefing schedule re sanctions Copy mailed to counsel of record
	272	Federal dfs' motion for protective order
Feb 28	273	Pls' motion to compel deposition discovery and for sanctions
Feb 29	274	Federal dfs' response to pls' interrogatories Nos. 14-39
	275	Pl states' motion to compel answers to interrogatories Nos. 25-26 by federal dfs
	276	Pls' motion to compel responses to joint request for production from federal dfs with affidavit of Rodney M. Confer and attachments including copies of *depositions* of Steve Rothe and Duane Sveum
	277	Pls K.C.Southern Railway, Nebraska-Iowa-Rocky Mountain Farmers Union, and Sierra Club's appeal from magistrate's order re responses from ETSI to interrogatories on economic feasibility issue
Mar 1	278	Federal dfs' response to pls' supplemental motion for summary judgment

DATE	NR.	PROCEEDINGS
1984		
Mar 2	279	ETSI's notice of filing responses to pls' requests for admissions in CV82-L-442
	280	ETSI's notice of filing response to pls' joint request for production
	281	Entered Memo & Order (WKU), filed 3-1-84, denying federal dfs' appeal of magistrate's order, #203, and pl states' cross-appeal of that same order, #'s 219, 220, and 221 and 230 Copy mailed to counsel
	282	Reporter's notice of taking deposition of *Steve Rothe* in behalf of pl St. of Mo.
	283	Reporter's notice of taking deposition of *Larry Hesse* in behalf of pl. K.C.So.Rwy
	284	Reporter's notice of taking deposition of *Laverne Horihan* in behalf of pl K.C. So. Rwy
	285	Reporter's notice of taking deposition of *Ralph Miller* in behalf of pl St.ofNe.
	286	Reporter's notice of taking deposition of *Thomas Aude* in behalf of pl St. of Ne.
Mar 5	287	Df's notice of service of interrogatories & response to requests for admissions to pl states
	288	Pl State of Iowa's application for expenses re motion to compel
	289	Affidavit of Elizabeth M. Osenbaugh in support
Mar 6	290	Pl State of Missouri's responses to federal dfs' interrogatories
	291	Pl State's motion to compel ETSI to answer interrogatories nos. 17, 29, 35, 37, 38, 39 & 40, with attachments including affidavit of Curtis F. Thompson and copy of *deposition* of Donald J. Miller

DATE	NR.	PROCEEDINGS
1984		
	292	Federal dfs' supplemental materials in support of motion for protective order, with affidavits of Robert F. Burford and Garrey E. Carruthers attached
Mar 7	293	Memo (WKU)
	294	Order (WKU) granting ETSI's motion to dismiss Kansas City Southern Railroad as a plaintiff, # 31; granting in part federal dfs' and ETSI's motions to dismiss #'s 70 & 104; and directing clerk to file certain documents in accordance with memo
	295	Documents filed in accordance with memo
	296	Memo & Order (WKU) denying federal dfs' appeal of magistrate's order of 12-30-83, #212
	297	Memo & Order (WKU) denying pls' appeal of magistrate's order of 2-21-84, #269 Copies of #'s 293, 294, 296 and 297 mailed to counsel
Mar 8	298	Pl State of Missouri's answer to interrogatory no. 12
Mar 12	299	Entered Memorandum and Order (WKU) filed 3-9-84, affirming magistrate's order of 11-3-83 re imposition of fees and costs Copy mailed to all counsel of record
	300	Federal dfs' supplemental response to pl states' request for production, with attachments
	301	Motion of ETSI for withdrawal of counsel William Linsenbard
Mar 13	302	Affidavit of John W. Robinson re his deposition

DATE	NR.	PROCEEDINGS
1984		
	303	Affidavit of Donald Rex Hammer re his deposition
	304	Affidavit of William Samuel Masters re his deposition
	305	Affidavit of Richard Bryan Pershall re his deposition
	306	Affidavit of Norman Stucky re his deposition
Mar 14	307	Entered Federal Dfs' notice of filing of administrative record & certifying affidavits, filed 2-12-84
	308	Certificate of service of motion of M. J. Bruckner to withdraw William Linsenbard as counsel
	309	Entered Federal Dfs' amended response to Pls' Interrogatories 14-39, filed 3-12-84
	310	Entered Federal Dfs' supplemental response to pls' joint request for production, filed 3-12-84
Mar 15	311	Entered Federal Dfs' response to Pls' motion to compel production, filed 3-13-84
Mar 16	312	Entered Order (DLP) filed 3-15-84 giving William Lisenbard leave to withdraw as counsel for ETSI (# 301)
	313	Memorandum and Order (WKU) denying appeal of Magistrate's order (#277) Copy of # 312 & # 313 mailed to counsel of record
Mar 19		*Deposition* of Avtar Singh Sandhu taken on behalf of K.C. Southern Railway, filed at direction of Magistrate, in CV82-L-442

DATE	NR.	PROCEEDINGS
1984		
		Deposition of William Bernard Harris taken on behalf of K.C. Southern Railway, filed at direction of Magistrate, in CV82-L-442 *Deposition* of Alan H. Plummer taken on behalf of K.C. Southern Railway, filed at direction of Magistrate, in CV82-L-442
	314	Motion of Kansas City Southern to file amended complaint, or, for reconsideration of order of 3-7-84
	315	Submissions in support
	316	Memorandum and Order (DLP) denying motions to file oppositions (# 148 & 184); to file reply brief (# 158); to defer ruling (#11); to compel (# 243, 273 & 276); for protective order (# 272); and awarding costs and attorney fees re motion # 273, giving ETSI 10 days to file application and pls 10 days to respond Copy mailed to all counsel of record
	317	Affidavit of David J. Hayes with exhibits in support of ETSI's pending motions (exhibits filed in CV82-L-442 only)
	318	Letter certificate of court reporter re *depositions* of Frank Ellis and Lawrence G. Kline.
Mar 21	319	ETSI's motion in limine to exclude introduction of duplicative testimony, with affidavit of David J. Hayes and *depositions* attached
	320	ETSI's motion in limine to exclude economic testimony offered by pls, with affidavit of David J. Hayes and attachments
	321	ETSI's motion in limine to exclude evidence related to hypothetical future withdrawals of Missouri River water, with affidavit of David J. Hayes and attachments

DATE	NR.	PROCEEDINGS
1984		
	322	ETSI's motion in limine to exclude introduction of undisclosed expert evidence, with affidavit of David J. Hayes and attachments
	323	ETSI's motion in limine to exclude introduction of legal testimony, with affidavit of David J. Hayes and copy of *depositions* of Ralph W. Johnson and Malcolm F. Baldwin
	324	Affidavit of David J. Hayes re States' motion to reconsider magistrater's order of 2-23-84, with attachments.
Mar 22	325	Affidavit of Curtis F. Thompson re motion to compel answers to interrogatories on df ETSI
Mar 23	326	Pl K.C.'s motion for time to submit costs & fees re court's order of 3-9-84
Mar 26	327	Affidavit of Wayne L. Decker
	328	Submission of original affidavit of Malcolm F. Baldwin
	329	Submission of original affidavits of Dr. Thomas O. Claflin and Thomas P. Ballestero and clearer copy of affidavit of Thomas S. Carter
Mar 27	330	Order (DLP) giving KCSR to 3-28-84 to submit itemized costs and fees (# 326) Copy mailed to counsel of record
Mar 28	331	Entered Memorandum and Order (DLP) filed 3-27-84 denying motion to compel answers to interrogatories (# 291) Copy mailed to counsel of record
	332	Application of KCSR and Nebraska, Iowa, and Rocky Mountain Chapters for expenses re court's order of 3-9-84, with affidavit of Stephen E. Roady in support
	333	Pls' appeal of magistrate's order of 3-19-84

DATE	NR.	PROCEEDINGS
1984		
	334	Order (DLP) on pretrial conference held 3-22 and 3-23-84 Copy mailed to all counsel of record
Mar 30	335	ETSI's showing in opposition to KCSR's motion to file amended complaint or for reconsideration, with attachments, including affidavits of Walter A. Hale, Avtar Singh Sandhu and Mary Anne Sullivan
Apr 2	336	Motion of Pl States and KCSR for time to respond to ETSI's motion in limine, with affidavit of G. Roderic Anderson in support
Apr 3	337	Motion of ETSI for reassignment to another judge, with affidavit of Paul G. Doran in support
	338	Certificate of court reporter re *deposition* of Duane Sveum
	339	Certificate of court reporter re *deposition* of John E. Velehradsky
Apr 4	340	Pl States and KCSR's motion in limine to exclude introduction of undisclosed expert evidence
	341	Submission of affidavit with attachments in support and in resistance to ETSI's motion in limine, no. 322
Apr 5	342	Pl States' motion for reconsideration of order denying motion to compel
	343	Affidavit of Thomas C. Sattler in support of K.C.'s response re opposition to motion to file amended complaint, etc., with attachments
	344	Affidavit of Mary Anne Sullivan and copy of *deposition* of Malcolm F. Baldwin and his affidavit in support of motion for summary judgment, # 239

DATE	NR.	PROCEEDINGS
1984		
	345	ETSI's supplemental motion in limine to exclude Malcolm F. Baldwin as a witness
Apr 9	346	Entered Memo & Order (DLP), filed 4-6-84, setting schedule for submitting undate exhibit list, etc.—continuing P.T. to 5-5-84 at 9:00 a.m.
	347	Memo & Order (DLP) granting application of State of Iowa for expenses, etc. re pl states' motion to permit inspection, # 288, and federal dfs to reimburse St. of Iowa sum of $525 —denying pl states' motion to reconsider order of 3-27-84, # 342
	348	Order (WKU) granting pl states & K.C.'s motion for time, #336 Copies mailed to counsel
	349	ETSI's opposition to pls' appeal of magistrate's order of 3-19-84 denying motion to compel
Apr 17	350	Affidavit of David J. Hayes re motion in limine to exclude economic testimony, with attachments
	351	Affidavit of David J. Hayes re motion to exclude undisclosed expert evidence, with attachments
Apr 18	352	Entered Memorandum and Order (DLP) filed 4-17-84 denying motion to compel (# 275) Copy mailed to counsel
Apr 19	353	Affidavit of Eliza Ovrom re pls' response to ETSI's motion in limine, w. attchmts.
	354	ETSI's motion to file unauthorized reply re pl states' response to motion for reassignment to another judge, with attachment

DATE	NR.	PROCEEDINGS
1984		
Apr 23	355	Memo & Order (DLP) pls to submit to counsel for dfs revised statement of issues Copy mailed to counsel
Apr 26	356	States' request for leave to respond to ETSI's reply re motion in limine to exclude introduction of undisclosed expert evidence
May 3	357	Memorandum and Order (DLP) that pretrial conference set for 5-4-84 is canceled until further order of the Court Counsel called and copy mailed to counsel of record
	358	Motion of Pls in 82-L-443 to strike re Memo of Federal dfs in support of ETSI's motion for reassignment; and for sanctions
	359	Memorandum (WKU)
	360	Judgment (WKU) Permanently Enjoining defendants from performing the "Industrial Water Service Contract Between the United States and ETSI Pipeline Project, a Joint Venture" dated 7-6-82: ETSI's motion for S.J. and joint motions of Federal dfs and ETSI to dismiss denied as to Ct. III (#67) (#70 & 104); Pls' motion for S.J. granted as to Ct. III (# 147) Copy of Memo & Order mailed to counsel of record
May 7	361	ETSI's motion for leave to serve brief exceeding 10 pages
May 8	362	KCS's motion to file amended complaint or for reconsideration of order with affidavits in support
May 14	363	Notice of Appeal of df U.S.A. with certificate of service on 5-14-84

DATE	NR.	PROCEEDINGS
1984		
		Copy delivered to Paula Mahlman, Court Reporter, Room 489 Federal Bldg., 100 Centennial Mall North, Lincoln, NE 86508. Tel. (402) 577-7924
May 15	364	ETSI's response to KCS' brief with affidavit of Walter A. Hale in support
	365	ETSI's Notice of Appeal with certificate of service on 5-14-84 Copy delivered to Paula Mahlman, Court Reporter
May 22		Two certified copies of Notice of Appeal of df U.S.A. filed 5-14-84, of ETSI's Notice of Appeal filed 5-15-84, of District Court's Memorandum and Order filed 5-3-84, of KCS's motion to file amended complaint or for reconsideration of order filed 5-8-84, and of all docket entries to date mailed to Clerk, U.S. Court of Appeals. Copy of docket entries mailed to all counsel of record
May 25	366	Memorandum and Order (WKU) granting in part and denying in part motions of KCSR for reconsideration and for leave to file amended complaint (#314 & 362)—reversing decision to dismiss railroad from Count XVII, and vacating earlier decision in regard to railroad on counts II, III, IV, VII, VIII, IX, X, and XVIII Copy mailed to counsel of record Two certified copies of last page of docket entries to date mailed to Court of Appeals
Jun 1	367	KCSR's motion to grant its motion for Summary Judgment (#147)
Jun 4	368	Application of Sierra Club and Farmers Union Chapters for attorneys' fees and expenses

DATE	NR.	PROCEEDINGS
1984		
	369	Motion of Farmers Union for costs, attorneys' fees and expenses
Jun 5	370	Federal Dfs' designation of record joining ETSI's *joint appendix*
June 14	371	Court Reporter's certification regarding *deposition* of William L. Baxter
	372	Court Reporter's certification regarding *deposition* of James J. Carney
June 15	373	Amended notice of appeal by federal defendants with certificate of service on 6-15-84
June 18		Two certified copies of Amended notice of appeal by federal defendants and of last page of docket entries mailed to Court of Appeals
Jun 18	374	Federal defendants' amended designation of record
	375	Federal defendants' amended designation of record Copy mailed to Court of Appeals with 2 certified copies of last page of docket entries
Jun 20	376	KCSR's motion for certification of 3-7-84 and 5-25-84 decisions for immediate appeal; and for entry of final judgment as to certain parts with affidavit in support and exhibits attached
Jun 25	377	Affidavit of John Stencel in support of motion of Farmers Union for fees and expenses
	378	Third amended complaint with request for trial at *Lincoln* Two certified copies of last page of docket entries mailed to Court of Appeals

DATE	NR.	PROCEEDINGS
1984		
Jun 27	379	States' motion for certification of 3-7-84 decision as modified 5-25-84 for immediate appeal pursuant to 28 USC 1292(b)
	380	Affidavit in support
Jul 9	381	Df ETSI's motion to strike pls' third amended complaint with attachments
	382	Federal dfs motion to strike pls' third amended complaint
Jul 10	383	ETSI's response to motions for certification with affidavit attached
Jul 19	384	Affidavit of Eliza Ovrom in support of States' reply to Fed. Dfs' response to pls' motion for certification (attachments in CV82-L-442)
Jul 23	385	Federal dfs' motion for access to administrative record
Jul 27	386	Memo & Order (WKU) granting ETSI's motion to submit briefs exceeding ten pages (#361) and railroad's motion for certification under 28 USC 1292(b) (#376); granting in part & denying in part States' motion for certification (#379); denying railroad's motion for s.j. (#367) and for entry of final judgment (#376); denying as moot States' motion for leave to respond to ETSI's reply brief (#356) and motions to file reply briefs (#356); and reserving ruling on motions of Sierra Club and Farmers Union chapters for attorneys' fees & costs (#'s 368 & 369) pending determination of appeal of permanent injunction Copy mailed to counsel Two certified copies mailed to Michael Gans, Court of Appeals, with two certified copies of last page of docket entries to date

DATE	NR.	PROCEEDINGS
1984		
Aug 16	387	Entered Order (WKU) filed 8-15-84 granting Corps of Engineers access to Administrative Record (#385)
	388	Memorandum and Order (WKU) that U.S. shall pay to pls KCSR and the Nebraska, Iowa & Rocky Mt. Farmers Union Chapters $1,000 and the pl State of Iowa $1,130 in expenses, including atty's fees (#332) Copy of filings 387 & 388 mailed to counsel of record
Oct 15	389	Copy of Order for Remand, U.S. Court of Appeals, to district court for consideration and determination of mootness, and retaining jurisdiction over appeals 84-1674 and 84-1675 pending determination, and directing order relating to mootness and any underlying record be certified to Circuit Court
Oct 17	390	Pls' submission of filings from Court of Appeals for consideration on issue of mootness and statement of intention to submit plan for limited discovery with affidavit of Rodney M. Confer attached and other attachments
Oct 18	391	Pls' supplemental submission of filings from Court of Appeals with attachments and affidavit of Rodney M. Confer attached
Oct 29	392	Pls' motion for leave to conduct limited discovery on issues of mootness & ripeness
Nov 2	393	Federal dfs' motion for time to respond to pls' motion to conduct limited discovery
Nov 6	394	Order (WKU) granting federal dfs' motion #393 Copy mailed to counsel

DATE	NR.	PROCEEDINGS
1984		
Dec 5	395	Federal dfs' response to pls' motion to conduct limited discovery
Dec 10	396	Pls' motion to deny participation of amici, or, for time to submit brief
Dec 21	397	Order (WKU) denying mot. to conduct discovery (#392); granting motion to deny participation of amici (#396); and setting evidentiary hearing on issue of mootness 12-28-84 at 9:00 a.m. Copy mailed to counsel
		Courtroom Minutes—on issue of mootness
Dec 28	398	Evidentiary hearing—before Judge Urbom—continuing oral argument on mootness to 2-11-85 at 12:00 p.m.
	399	List of witnesses
	400	List of exhibits
1985		
Feb 6	401	Certif. of service of State of So. Dakota of memo in opposition to pls' motion to dismiss
Feb 7	402	Pls' motion to submit brief in excess of 10 pages on issue of mootness
	403	Affidavit of Eliza Ovrom and attchmts. including copy of *deposition* of Paul Doran on issue of mootness (deposition filed in CV82-L-442)
Feb 8	404	Affidavits of M. J. Bruckner and Paul Doran re opposition of ETSI to motion to dismiss appeal as moot, with copy of *deposition* of Paul Doran & attchmts. (deposition & attchmts. filed in CV82-L-442)
Feb 11	405	Order (WKU) giving Pls leave to submit brief in excess of 10 pages (#402) Copy delivered & mailed to counsel of record

DATE	NR.	PROCEEDINGS
1985		
	406	Courtroom minutes—hearing on issue of mootness—submitted
Feb 13	407	Entered Memorandum & Order (WKU), filed 2-12-85, that action is not moot Copy mailed to counsel of record and certified copy to Court of Appeals
Feb 28		Reporter's transcript of evidentiary hearing on 12-28-84 filed in CV82-L-442 Reporter's transcript of arguments on issue of mootness on 2-11-85 filed in CV82-L-442
Mar 18	408	Entered Affidavit of Rodney M. Confer to supplement record on issue of mootness filed 3-15-85 Two certified copies mailed to U. S. Court of Appeals
May 13	409	Copy of Order, U.S. Court of Appeals, Eighth Circuit, granting petitions for permission to appeal under 28 USC 1292(b) by KCSR, State of Iowa, Missouri, and Nebraska
1986		
Jul 25	410	Certified copy of Judgment, U.S. Court of Appeals, with copy of opinion attached, affirming District Court Judgment, with Appellees/Cross-appellants, States of Nebraska, Iowa, and Missouri to recover sum of $285.00 costs
	411	Certified copy of modification of opinion to include disposition in CV82-L-443 Copy of filings 410 & 411 mailed to counsel
Dec 17	412	Notice by Supreme Court of the U.S. for filing of petition for certiorari
1987		
Mar 9	413	Notice of U.S. Supreme Court of filing petition for certiorari

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1675

THE STATE OF MISSOURI, *et al.*,
Appellees

v.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Appellants

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1984	
May 25	DOCKETED appeal.
" "	CERTIFIED copies of notice of appeal, docket entries and order dated May 25, 1984
May 25	*BRIEFING SCHEDULE* Appellant DR 6/4/84; Appellee D.R. 6/14/84; Clerk's Record 6/25/84; Appendix 7/5/84; Transcript 6/25/84; Applnt. Brief 7/5/84; Apple. Brief 8/6/84; with 84-1674
May 29	MOTION of aplnt for expedited briefing schedule w/1674
May 30	ORDER: Aplnts motion for expedited briefing schedule is denied. Clerk is directed to set this cASE FOR ARGUMENT AND SUBMIssion during the Sept. 1984 session of Court in St. Louis, MO w/1674
May 31	APPEARANCE for appellee. (2)
June 4	APPEARANCE for appellee. (3)

DATE	FILINGS—PROCEEDINGS
1984	
" "	APPEARANCE for appellee. (4)
" "	APPEARANCE for appellee. (5)
" "	APPEARANCE for appellee. (6)
" "	APPEARANCE for appellant. (7)
June 5	APPEARANCE for appellee. (8)
June 6	BRIEFING SCHEDULE: DR aplnt/aplee (Fed Govt. ETS) and DR apee/cr. aplnt (states) due 6/14/84, clerk's record 6/25/84 or joint appendix due 7/5/84 tr. due 6/25/84, brief aplnt (Fed/ETS due 7/5/84, brief aplee/cr. aplnt (States) due 8/6/84, brief aplees KCSRwy/Sierra, et al. due 8/6/84, reply brief aplnt/cr. aplee (Fed/ETS) due 8/20/84, reply brief/cr. aplnt (States) due 9/3/84 w/others.
June 7	APPEARANCE for appellee. (9)
June 15	MOTION of aplees for ext. of time to designate record MOTION GRANTED 10 days after aplnt designates. NO EXT. OF BRIEFING SCHEDULE on 6/15/84 w/others
June 15	Appellees Motion regarding record (10) cj
June 15	ORDER: Parties are directed to confer by 6/22/84 and agree upon a form of the record. If they cannot agree, they shall contact the Clerk of the court for assistance in resolving the dispute. Aplnt. shall immediately prepare and file a statement of the issues on appeal in accordance with Fed. R. of Appellate Procedure 10(b)(3). Aplees'. designations of record shall be filed by 6/29/84. w/1674
Jun 18	APPEARANCE for appellee (Sierra Club) (11) vmk
Jun 20	APPEARANCE for appellant. (Energy Trans.) (12) vmk

DATE	FILINGS—PROCEEDINGS
1984	
June 28	LAW CLERK MEMO
July 3	MOTION to file joint deferred appendix MOTION GRANTED—parties to proceed pursuant to Rule 30 (c) on 7/3/84 w/others
July 5	*BRIEF APPELLANT* (ETSI Transportation) w/ser 7/3 7 copies (13)
July 5	*BRIEF AMICUS CURIAE* (State of South Dakota) w/others
" "	APPEARANCE appellee (14)
July 25	TO SCREENING w/1674, 1719, 20, 21 30 min.
July 30	ORDER: The motion of Appellees States of MO, IA and NE to dismiss the appeal of Colonel William R. Andrews, Jr., et al (U.S.) is denied. Briefing Schedule previously established remains in effect. w/1674
Aug. 2	Motion for Extension of Time and Memorandum in Support Thereof w/others
Aug. 3	Notice of Private appellees Kansas City Southern Railway Co., The Sierra Club, & the Iowa and Nebraska Chapters of the Nat'l Farmers Union Concerning Request for Extension of Time w/ others
Aug. 6	Petition for Permission to Appeal Interlocutory Order Certified by District Court w/others
Aug 10	FEDERAL APPELLANTS' response to Appellee States' motion for extension of time w/service w/all nos.
Aug 15	Transferred to September session at St. L w/1674, 1719, 20, 21

DATE	FILINGS—PROCEEDINGS
1984	
Aug 16	ORDER: Motion of Missouri, Iowa, and Nebraska for permission to appeal interlocutory orders certified by the district court and filed on 8/6/84 is denied without prejudice pending consideration of a suggestion of mootness which may be made by the parties in relation to the appeal from an injunction by the district court dated 5/3/84. The motion of Kansas City Southern RR Co. for permission to appeal interlocutory orders is also denied without prejudice for the reason stated above. The motion for ext. of time is granted and the appeals from the injunction of the district court dated 5/3/84 are stricken from the calendar of the Sept. Session of this court. The court requests that any suggestions of mootness of the case and any opposition to such suggestions be promptly filed by interested parties w/all others.
Aug 20	REPLY of federal appellants to petition by states to appeal interlocutory order. (w/all other numbers) cg
Aug 31	Motion to Dismiss ETSI's Appeal w/others
Aug 31	Suggestions of Mootness w/others
Aug 31	States' Memorandum on Mootness and Ripeness w/others
Aug 31	Affidavit of Elizabeth M. Osenbaugh w/others
Aug 31	Appendix to Motion to Dismiss w/others
Aug 31	Motion of Appellees to Dismiss Appeal as Moot or Unripe w/others
Aug 31	Memorandum in Support of Motion to Dismiss as Moot or Unripe
Aug 31	Exhibits to Memorandum w/others

DATE	FILINGS—PROCEEDINGS
1984	
Aug 31	Motion to Dismiss as Moot on Behalf of Appellees w/others
Aug 31	Memorandum in Support of Motion to Dismiss w/others
Sept. 11	Appellant's Motion for Extension of Time to Respond to Appellee's Motion to Dismiss w/1674
Sept. 14	ORDER: appellant's motion for extension of time to respond to appellee motion to dismiss is granted. The response is due to be filed by September 24, 1984.
Sept. 17	RESPONSE of Amicus Curiae State of SD in Opposition to Motion of Plaintiffs-Appellees to Dismiss. w/service. w/84-1674/1719/20/21.
Sept. 25	Appellant's Opposition to the Motions of All Appellees to Dismiss (Justice)
Sept. 25	Appellant's Opposition to the Motions of All Appellees to Dismiss (Energy)
Sept. 28	Response of AMICI Mid-West Electric, North Dakota Water Users, East River Electric, & Nat'l Water Resources Assn. to Appellees Motions to Dismiss
Oct. 12	ORDER: We remand 1674 & 1675 to the district court for determination of whether the action is now moot. We retain jurisdiction. w/others
1985	
Feb. 25	ORDER: This matter is set for arg. on Tues., 4/9/85, at 3:00 p.m. in St. Louis. Arg. will be limited to the issue of mootness. The aplees. States of MO, IA and NE are granted leave to file a single consolidated brief on the issue of mootness. The brief is limited to 30 pages and is due

DATE	FILINGS—PROCEEDINGS
1985	
	3/15/85. Appellees, Kansas City Southern Railway, Sierra Club, and Nebraska, Iowa and Rocky Mountain Chapters of the Nat'l Farmers Union, as well as any other party not named in this order supporting dismissal for mootness, may also file a single, consolidated brief on the issue of mootness. This brief is also due 3/15/85 and limited to 30 pages. Appellants, ETSI and Andrews may each file briefs in opposition. These briefs are due 4/1/85. Each brief is limited to 30 pages. Any other party opposing dismissal may join in these briefs. If the court determines after arg. that these appeals are not moot, a briefing schedule will be entered. The Court will also consider the application for leave to take an interlocutory appeal in Misc. 84-8114. w/others.
July 22	JOINT APPENDIX, VOLS. 1 & 2. w/all numbers
Mar. 18	*BRIEF OF APLEES* (Kansas City RR Co., Sierra, et al) on mootness *BRIEF OF APLEES* (State of Missouri, et al) on mootness *AFFIDAVIT OF ELIZA OVROM*
Mar 19	*Transferred to April Session* in St. Louis
Apr. 1	*BRIEF APPELLANT (ETSI)* on mootness w/ 1674
Apr. 2	*BRIEF APPELLANTS* (U.S.A.) on issue of mootness w/1674
Apr. 9	ARGUED AND SUBMITTED IN ST. LOUIS *ON THE ISSUE OF MOOTNESS ONLY* TO JUDGES BRIGHT, J. R. GIBSON, and FAGG. Ms. Eliza Ovrom (AAG of Iowa) for appellees (who are movants on motion to dismiss); Mr. Fred R. Disheroon (Just. Dept.) for appellants and Mr. James A. Hourihan for appellant (En-

DATE	FILINGS—PROCEEDINGS
1985	
	ergy Transportation Systems) (who are both respondents as to the motion to dimiss on mootness). Rebuttal by Mr. Stephen E. Roady (for private appellees). Recorded. w/84-1674/1719/20/21.
Apr. 12	Received copy of 28(j) correspondence from counsel for appellees/cr. appe appellants (O.K. per L.P.)—TO COURT. w/1676/1719/1720/1721/Misc. 84-8114.rh
Apr. 22	ORDER: Order of the dist. ct. that this appeal is not moot is affirmed Appellees have 30 days to file briefs with this Court and appellants may file reply briefs w/in time provided in FRAP 31. (UNPUBLISHED) (with all numbers)
May 2	RESUBMISSION of Petition for permission to appeal per § 1292 w/1674
May 3	MOTION of (States) to renew petition for permission to appeal w/others
May 9	ORDER: The petition for permission to appeal under 28 U.S.C. § 1292(b) filed by the Kansas City Southern Railway Co., State of Iowa, State of Missouri and State of Nebraska are granted. This group of appeals and cross-appeals are set for argument on Tuesday, August 20, 1985, at 9:00 a.m. in St. Paul, Minnesota. w/others
May 20	MOTION BY APLEE/CR-APLNT (State of MO) for ext. of time to file reply brief, MOTION GRANTED TO & INCL. 5/24/85 on 5/23/85
May 24	*BRIEF APPELLEES* (Kansas City Southern RR, et al) w/ser 5/22 8 copies (15)
May 28	*BRIEF APPELLEES* (States of MO, IA and NE) w/ser 5/24 (1 copy) (16) cm

DATE	FILINGS—PROCEEDINGS
1985	
June 3	MOTION BY APLNT for ext. of time to file reply brief
June 7	On aplnt ETSI's motion, ETSI and Andrew, et al are granted to June 14, 1985 to file reply brief
June 12	*REPLY BRIEF FOR AMICUS CURIAE STATE OF SOUTH DAKOTA* w/1674
June 14	*REPLY BRIEF FOR ENERGY TRANSPORTATION SYSTEMS, INC.* w/ser 6/13 7 copies (17)
July 3	*REPLY BRIEF FOR STATES OF MISSOURI, IOWA AND NEBRASKA*: w/ser 7/1 w/1674, 1719, 1720, 1721
July 29	*BRIEF APPELLEES* (KCSR, et al) (30 c brief) (18) cm
" "	*BRIEF APPELLANT* (ETSI) (30 c brief) (19) cm
" "	*REPLY BRIEF (ETSI)* (30 c brief) (20) cm
" "	*BRIEF APPELLEES (States)* (30 c brief) (21) cm
Aug. 16	NOTIFICATION OF RELATED CASE and filing of original action in the U.S. Supreme Court. (w/84-1674) cg
Aug. 19	Motion for leave to file complaint, complaint & brief in support of motion for leave to file complaint.
Aug. 19	APPENDICES A. B. C & D to motion for leave.
Aug. 19	Received additional citation from counsel for State of Iowa. (to court)
Aug. 20	ARGUED & SUBMITTED TO JUDGES J. GIBSON, BRIGHT AND FAGG IN ST. LOUIS, MO. Fred Disheroon for U.S. parties, James A. Houri-

DATE	FILINGS—PROCEEDINGS
1985	
	han for ETSI Elizabeth Osenbaugh, for State appellees, Stephen Roady, for K.C. RR and Sierra appellees. Mr. Disheroon and Mr. Hourihan on Rebuttal. RECORDED w/all others. (cm)
Aug. 19	Received copy of 28(j) correspondence from counsel for State appellees. (O.K. per L.P.)—rh—TO COURT.
Aug. 27	Motion of counsel for the State of Iowa, requesting leave to cite additional documents after oral argument. Also leave to file a further brief in the matter. rh
Sept. 24	ORDER: The request of the State of Iowa to furnish additional citations granted. All parties may file on or before 9/30/85 a filing not to exceed 3 pages on the citations. Additional argument will not be allowed. (UNPUBLISHED) (w/all numbers) cg
Oct. 1	ETSI's Submission in Response to the Court's Order of Sept. 24, 1985. w/others
Oct. 1	Response of Appellees to Order of Sept. 24, 1985 w/others
Oct. 4	Response of Federal Appellants to the Court's Sept. 24, 1985 Order w/others
Oct. 23	Rec'd Supreme Court Brief of Defendants in Opposition to Motion for Leave to File Complaint and Appendix w/others
Nov. 4	Received Reply Brief in Support of Motion for Leave to File Complaint
1986	
Mar. 13	OPINION BY John R. Gibson PUBLISHED DISSENT by Bright w/all nos.

DATE	FILINGS—PROCEEDINGS
1986	
Mar. 13	JUDGMENT: Judgment of dist ct is affirmed in accord w/opinion. w/all
March 13	ORDER: Opinion filed this date includes the disposition of Case No. 85-1593. The opinion is hereby modified to include case 85-1593. (w/85-1593 and 84/1674/1719/1720/1721) cg
Mar. 25	APPELLEES' BILL OF COSTS. w/service. w/1674. rh. (PRIVATE APPELLEES)
Mar. 25	REQUEST APPELLANTS FOR ENLARGEMENT OF TIME IN WHICH TO FILE PETITION FOR REHEARING. w/service. w/1674. "GRANTED TO 4/28/86 on 3/25/86." rh
Mar. 28	APPELLEES/CROSS APPELLANTS, STATE OF MISSOURI, IOWA AND NEBRASKA BILL OF COSTS w/service. w/1674/1719/1720/1721) rh
Apr. 8	Motion Federal Appellants (Kansas City Southern R.R., Co.) for an extension of time to file Objections to Private Appellees' Bill of Costs. w/service. w/84-1674. rh "MOTION GRANTED TO 4/19/86 on 4/9/86."
Apr. 17	OBJECTION FEDERAL APELLANTS TO BILL OF COSTS OF PRIVATE APPELLEES. w/service. w/1674/et al. rh
Apr. 30	PETITION APPELLANTS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC. w/service. w/84-1674/et al. rh
Apr. 28	PETITION APPELLANTS' ENERGY TRANSPORTATION SYSTEMS, INC. FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC. w/service. w/1674/et al. rh

DATE	FILINGS—PROCEEDINGS
1986	
Apr. 25	RESPONSE OF PRIVATE APPELLEES TO FEDERAL APPELLANTS' OBJECTION TO BILL OF COSTS. w/1674/et al. rh (RECEIVED)
May 5	ORDER: The bill of costs submitted by appellees Kansas City Southern Railway Company, et al., has been considered by the Court, and is denied. w/1674/1719/1720/1721-NE. rh
May 15	ORDER: Appellees' motion for extension of time to file response to the petitions for rehearing en banc herein is granted. Appellees may have to and including June 2, 1986 to file response. w/1674/1719/1720/1721. rh
May 13	MOTION APPELLEES FOR ENLARGEMENT OF TIME IN WHICH TO RESPOND TO THE PETITION FOR REHEARING. w/service. w/1674/1719/1720/1721. rh
May 21	AMICUS CURIAE'S RESPONSE TO PETITIONS FOR REHEARING EN BANC. w/service w/1674. rh (RECEIVED). Filed 6/5/86 per directions from the Court. rh
May 30	APPELLEES' RESPONSE TO APPELLANTS' PETITION FOR REHEARING. w/service. w/1674/1719/1720/1721. rh
June 2	APPELLEES' STATES MISSOURI, IOWA AND NEBRASKA RESPONSE TO PETITION FOR REHEARING. w/service. w/1674/1719/1720/1721. rh
July 25	MANDATE ISSUED. w/others. eh
July 28	RECEIPT FOR MANDATE. w/others. rmh.

DATE	FILINGS—PROCEEDINGS
1986	
July 10	ORDER: APPELLANTS' petitions for rehearing en banc have been considered by the Court and are denied. Judges Donald P. Lay, Gerald W. Heaney, Theodore McMillian, Roger L. Wollman, and Frank Magill would have granted the petitions. Petitions for rehearing by the panel are also denied w/others. eh
July 22	MANDATE ISSUED w/others. eh
Oct 6	RECEIVED NOTIFICATION from Supreme Court that extension of time to file petition for writ of certiorari has been granted to December 7, 1986. eh

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1719

THE STATE OF MISSOURI, *et al.*,
Appellants

v.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Appellees

RELEVANT DOCKET ENTRIES

DATE	FILINGS--PROCEEDINGS
1984	
June 6	Docketed Case
" "	Certified copies of notice of appeal; docket entries; memorandum on standing issues; order and memorandum order rec'd from Dist. Ct. (1)
June 6	BRIEFING SCHEDULE: DR aplnt/aplee (Fed. Govt. ETS) and DR apee/cr. aplnt (states) due 6/14/84, clerk's record 6/25/84 or joint appendix due 7/5/84 tr. due 6/25/84, brief aplnt (Fed/ETS due 7/5/84, brief aplee/cr. aplnt (States) due 8/6/84, brief aplees KCSRwy/Sierra, et al due 8/6/84, reply brief aplnt/cr. aplee (Fed/ETS) due 8/20/84, reply brief/cr. aplnt (States) due 9/3/84 w/others.
June 15	MOTION of aplees for ext. of time to designate record MOTION GRANTED 10 days after aplnt designates. NO EXT. OF BRIEFING SCHEDULE on 6/15/84 w/others

DATE	FILINGS—PROCEEDINGS
1984	
June 15	APPEARANCE for appellant (2)
June 21	Appearance for federal appellees (3)
July 5	*BRIEF APPELLANT* (ETSI) w/others
July 5	*BRIEF AMICUS CURIAE* (State of South Dakota) w/others
July 10	*BRIEF APPELLANT* (Govt.) w/others
July 25	TO SCREENING w/1674,5, 1720,21 30 min.
Aug. 2	Motion for Extension of Time and Memorandum in Support Thereof w/others
Aug. 3	Notice of Private appellees Kansas City Southern Railway Co., The Sierra Club, & the Iowa and Nebraska Chapters of the Nat'l Farmers Union Concerning Request for Extension of Time w/others
Aug. 6	Petition for Permission to Appeal Interlocutory Order Certified by District Court w/others
Aug 10	FEDERAL APPELLANTS' response to Appellee States' motion for extension of time w/service w/all nos.
Aug 15	Transferred to September session at St. L. w/ 1674,5, 1720,21
Aug. 16	ORDER: Motion of Missouri, Iowa, and Nebraska for permission to appeal interlocutory orders certified by the district court and filed on 8/6/84 is denied without prejudice pending consideration of a suggestion of mootness which may be made by the parties in relation to the appeal from an injunction by the district court dated 5/3/84. The motion of Kansas City Southern RR Co. for permission to appeal interlocutory orders is also denied without prejudice for the reason

DATE	FILINGS—PROCEEDINGS
1984	
	stated above. The motion for ext. of time is granted and the appeals from the injunction of the district court dated 5/3/84 are stricken from the calendar of the Sept. Session of this court. The court requests that any suggestions of mootness of the case and any opposition to such suggestions be promptly filed by interested parties w/all others.
Aug. 20	REPLY of federal appellants to petition by states to appeal interlocutory order. (w/all other numbers) cg
Aug. 31	Motion to Dismiss ETSI's Appeal w/others
Aug. 31	Suggestions of Mootness w/others
Aug. 31	States' Memorandum on Mootness and Ripeness w/others
Aug. 31	Affidavit of Elizabeth M. Osenbaugh w/others
Aug. 31	Appendix to Motion to Dismiss w/others
Aug. 31	Motion of Appellees to Dismiss Appeal as Moot or Unripe w/others
Aug. 31	Memorandum in Support of Motion to Dismiss as Moot or Unripe
Aug. 31	Exhibits to Memorandum w/others
Aug. 31	Motion to Dismiss as Moot on Behalf of Appellees w/others
Aug. 31	Memorandum in Support of Motion to Dismiss w/others
Sept. 17	RESPONSE of Amicus Curiae State of SD in Opposition to Motion of Plaintiffs-Appellees to Dismiss. w/service. w/84-1674/75/1720/21.
Sept. 25	Appellant's Opposition to the Motions of All Appellees to Dismiss

DATE	FILINGS—PROCEEDINGS
1984	
Sept. 25	Appellant's Opposition to the Motions of all Appellees to Dismiss
Sept. 28	Response of Amici Mid-West Electric, North Dakota Water Users, East River Electric, & Nat'l Water Resources Assn. to Appellees Motions to Dismiss w/others
Oct. 12	ORDER: We remand 1674 & 1675 to the district court for determination of whether the action is now moot. We retain jurisdiction. w/others (unpub)
1985	
Feb. 25	ORDER: This matter is set for arg. on Tues., 4/9/85, at 3:00 p.m. in St. Louis. Arg. will be limited to the issue of mootness. The aplees. States of MO, IA and NE are granted leave to file a single consolidated brief on the issue of mootness. The brief is limited to 30 pages and is due 3/15/85. Appellees, Kansas City Southern Railway, Sierra Club, and Nebraska, Iowa and Rocky Mountain Chapters of the Nat'l Farmers Union, as well as any other party not named in this order supporting dismissal for mootness, may also file a single, consolidated brief on the issue of mootness. This brief is also due 3/15/85 and limited to 30 pages. Appellants, ETSI and Andrews may each file briefs in opposition. These briefs are due 4/1/85. Each brief is limited to 30 pages. Any other party opposing dismissal may join in these briefs. If the court determines after arg. that these appeals are not moot, a briefing schedule will be entered. The Court will also consider the application for leave to take an interlocutory appeal in Misc. 84-8114. w/others
Mar. 18	*BRIEF OF APPELLEES* (Kansas City RR Co. Sierra, et al) on mootness

DATE	FILINGS—PROCEEDINGS
1985	
" "	*BRIEF OF APLEES* (State of Missouri, et al) on mootness
" "	*AFFIDAVIT of ELIZA Ovrom*
Mar 19	*Transferred to April Session* in St. Louis. w/ others
Apr. 9	ARGUED AND SUBMITTED IN ST. LOUIS *ON THE ISSUE OF MOOTNESS ONLY* TO JUDGES BRIGHT, J. R. GIBSON, and FAGG. Ms. Eliza Ovrom (AAG of Iowa) for appellees (who are movants on motion to dismiss); Mr. Fred R. Disheroon (Just. Dept.) for appellants and Mr. James A. Hourihan for appellant (Energy Transportation Systems) (who are both respondents as to the motion to dismiss on mootness). Rebuttal by Mr. Stephen E. Roady (for private appellees). Recorded. w/84-1674/75/1720/21.
Apr. 12	Received copy of 28(j) correspondence from counsel for appellees/cr. appellants. (O.K. per L.P.)—TO COURT. w/1675/1676/1720/1721/Misc. 84-8114. rh
Apr. 22	ORDER: Order of the dist. ct. that this appeal is not moot is affirmed. Appellees have 30 days to file briefs with this Court and appellants may file reply briefs w/in time provided in FRAP 31. (UNPUBLISHED) (with all numbers)
May 3	MOTION of (States) to renew petition for permission to appeal w/others
May 9	ORDER: The petition for permission to appeal under 28 U.S.C. § 1292(b) filed by the Kansas City Southern Railway Co., State of Iowa, State of Missouri and State of Nebraska are granted. This group of appeals and cross-appeals are set for argument on Tuesday, August 20, 1985, at 9:00 a.m. in St. Paul, Minnesota. w/others

DATE	FILINGS—PROCEEDINGS
1985	
May 20	MOTION BY APLEE/CR-APLNT (State of MO) for ext. of time to file reply brief, MOTION GRANTED TO & INCL. 5/24/85 on 5/23/85
May 28	*BRIEF APPELLEES* (State of MO, IA and NE) w/84-1674/1720/1721
June 7	On aplnt ETSI's motion, ETSI and Andrew, et al are granted to June 14, 1985 to file their reply brief.
June 3	MOTION BY APLNT TO FILE REPLY Brief
June 17	*REPLY BRIEF OF FEDERAL APPELLANTS* w/1674/1720/1721
June 14	*REPLY BRIEF FOR ENERGY TRANSPORTATION SYSTEMS, INC.* w/1675/1719/1720/1721
July 3	*REPLY BRIEF FOR STATES OF MISSOURI, IOWA AND NEBRASKA*: w/ser 7/1 w/1674, 1675, 1720, 1721
July 22	JOINT APPENDIX, VOLS. 1 & 2. w/all numbers
Aug. 16	NOTIFICATION OF RELATED CASE and filing of original action in the U.S. Supreme Court. w/ 84-1674) cg
Aug. 19	Motion for leave to file complaint, complaint & brief in support of motion for leave to file complaint. cg
Aug. 19	APPENDICES A. B. C & D to motion for leave. cg
Aug. 19	Received additional citation from counsel for State of Iowa. cg
Aug. 20	ARGUED & SUBMITTED TO JUDGES J. GIBSON, BRIGHT, AND FAGG IN ST. LOUIS, MO. Fred Disheroon for U.S. parties, James A. Hourihan for ETSI, Elizabeth Osenbaugh, for State ap-

DATE	FILINGS—PROCEEDINGS
1985	
	pellees, Stephen Roady, for K.C. RR and Sierra appellees. Mr. Disheroon and Mr. Hourihan on Rebuttal. RECORDED w/all others. (cm)
Aug. 19	Received copy of 28(j) correspondence from counsel for State appellees. (O.K. per L.P.)—rh —TO COURT
Aug. 27	Motion of counsel for the State of Iowa, requesting leave to cite additional documents after oral argument. Also leave to file a further brief in the matter. rh.
Sept. 24	ORDER: The request of the State of Iowa to furnish additional citations granted. All parties may file on or before 9/30/85 a filing not to exceed 3 pages on the citations. Additional argument will not be allowed. (UNPUBLISHED) (w/all numbers) cg
Oct. 1	ETSI's Submission in Response to the Court's Order of Sept. 24, 1985. w/others
Oct. 1	Response of Appellees to Order of Sept. 24, 1985 w/others
Oct. 4	Response of Federal Appellants to the Court's Sept. 24, 1985 Order w/others
Oct. 23	Rec'd Supreme Court Brief of Defendants in Opposition to Motion for Leave to File Complaint and Appendix w/others
Nov 4	Received Reply Brief in Support of Motion for Leave to File Complaint
1986	
Mar. 13	OPINION BY John R. Gibson PUBLISHED DISSENT by Bright w/all nos. 787 F2d 270 86
Mar. 13	JUDGMENT: Judgment of dist ct is affirmed in accord w/opinion. w/all

DATE	FILINGS—PROCEEDINGS
1986	
March 13	ORDER: Opinion filed this date includes the disposition of case No. 85-1593. The opinion is hereby modified to include case 85-1593. (w case no. 85-1593/84-1674/1675/1720/1721) cg
Mar. 28	APPELLEES/CROSS APPELLANTS, STATE OF MISSOURI, IOWA AND NEBRASKA, BILL OF COSTS. w/service. w/1674/1675/1720/1721. rh
Apr. 25	RESPONSE OF PRIVATE APPELLEES TO FEDERAL APPELLANT'S OBJECTION TO BILL OF COSTS. w/service. w/1674/1675/1720/1721. (RECEIVED) rh
Apr. 28	PETITION APPELLANTS' ENERGY TRANSPORTATION SYSTEMS, INC., FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC. w/service. w/1674/1675/1720/1721. (RECEIVED) rh.
Apr. 30	PETITION APPELLANTS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC. w/service. w/1674/1675/1720/1721. rh
May 5	ORDER: The bill of costs submitted by appellees Kansas City Southern Railway company, et al., has been considered by the Court, and is denied. w/1674/1675/1720/1721-NE. rh.
May 15	ORDER: Appellees' motion for extension of time to file response to the petitions for rehearing en banc filed herein is granted. Appellees may have to and including June 2, 1986 to file response. w/1674/1675/1720/1721. rh.
May 13	MOTION APPELLEES FOR ENLARGEMENT OF TIME IN WHICH TO RESPOND TO THE PETITION FOR REHEARING. w/service. w/1674/1675/1720/1721. rh

DATE	FILINGS—PROCEEDINGS
1986	
May 30	APPELLEES' RESPONSE TO APPELLANTS' PETITION FOR REHEARING. w/service. w/ 1674/1675/1720/1721. rh.
June 2	APPELLEE'S STATES, MISSOURI, IOWA AND NEBRASKA RESPONSE TO PETITION FOR REHEARING EN BANC. w/service. w/ 1674/1675/1720/1721 rh
July 10	ORDER: APPELLANTS' petitions for rehearing en banc have been considered by the Court and are denied. Judges Donald P. Lay, Gerald W. Heaney, Theodore McMillian, Roger L. Wollman, and Frank Magill would have granted the petitions. Petitions for rehearing by the panel are also denied. w/others eh
July 22	MANDATE ISSUED w/others eh
July 28	RECEIPT FOR MANDATE. w/others. rmh

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1720

THE STATE OF MISSOURI, *et al.*,
Appellants

v.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Appellees

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1984	
June 6	DOCKETED Cross appeal
" "	Certified copies of notice of cross appeal; docket entries; and orders rec'd from District Court. (1)
June 6	BRIEFING SCHEDULE: DR aplnt/aplee (Fed. Govt (ETS) and DR apee/cr. aplnt (states) due 6/14/84, clerk's record 6/25/84 or joint appendix due 7/5/84 tr. due 6/25/84, brief aplnt (Fed/ETS due 7/5/84, brief applee/cr. aplnt (States) due 8/6/84, brief aplees KCSRwy/Sierra, et al due 8/6/84, reply brief aplnt /cr. aplee (Fed/ETS) due 8/20/84, reply brief/cr. aplnt (States) due 9/3/84 w/others.
June 15	MOTION of aplees for ext. of time to designate record MOTION GRANTED 10 days after aplnt designates. NO EXT. OF BRIEFING SCHEDULE on 6 '5/84 w/others.
June 15	APPEARANCE for appellant.

DATE	FILINGS—PROCEEDINGS
1984	
June 18	Appearance for appellee
June 21	Appearance for federal appellees
July 5	*BRIEF APPELLANT* (ETSI) 7 copies w/others
July 5	*BRIEF AMICUS* (State of South Dakota) w/ others
July 10	*BRIEF APPELLANT* (Govt.) w/others
July 25	TO SCREENING w/1674,5,1719,21 30 min
Aug. 2	Motion for Extension of Time and Memorandum in Support Thereof w/others
Aug. 3	Notice of Private appellees Kansas City Southern Railway Co., The Sierra Club, & the Iowa and Nebraska Chapters of the Nat'l Farmers Union Concerning Request for Extension of Time w/ others
Aug. 6	Petition for Permission to Appeal Interlocutory Order Certified by District Court w/others
Aug. 10	FEDERAL APPELLANTS' response to Appellee States' motion for extension of time w/service w/all nos.
Aug 15	Transferred to September session at St. Louis w/1674,5,1719,21
Aug. 16	ORDER: Motion of Missouri, Iowa, and Nebraska for permission to appeal interlocutory orders certified by the district court and filed on 8/6/84 is denied without prejudice pending consideration of a suggestion of mootness which may be made by the parties in relation to the appeal from an injunction by the district court dated 5/3/84. The motion of Kansas City Southern RR Co. for permission to appeal interlocutory orders is also denied without prejudice for the reason stated above. The motion for ext. of time

DATE	FILINGS—PROCEEDINGS
1984	
	is granted and the appeals from the injunction of the district court dated 5/3/84 are stricken from the calendar of the Sept. Session of this court. The court requests that any suggestions of mootness of the case and any opposition to such suggestions be promptly filed by interested parties w/all others.
Aug. 20	REPLY of federal appellants to petition by states to appeal interlocutory order. (w/all other numbers) cg
Aug. 31	Motion to Dismiss ETSI's Appeal w/others
Aug. 31	Suggestions of Mootness w/others
Aug. 31	States' Memorandum on Mootness and Ripeness w/others
Aug. 31	Affidavit of Elizabeth M. Osenbaugh w/others
Aug. 31	Appendix to Motion to Dismiss w/others
Aug. 31	Motion of Appellees to Dismiss Appeal as Moot or Unripe w/others
Aug. 31	Memorandum in Support of Motion to Dismiss as Moot or Unripe
Aug. 31	Exhibits to Memorandum w/others
Aug. 31	Motion to Dismiss as Moot on Behalf of Appellees w/others
Aug. 31	Memorandum in Support of Motion to Dismiss w/others
Sept. 17	RESPONSE OF Amicus Curiae State of SD in Opposition to Motion of Plaintiffs-Appellees to Dismiss. w/service. w/84-1674/75/1719/21.
Sept. 25	Appellant's Opposition to the Motions of All appellees to Dismiss
Sept. 25	Appellant's Opposition to the Motions of all appellees to Dismiss

DATE	FILINGS—PROCEEDINGS
1984	
Sept. 28	Response of Amici Mid-West Electric, North Dakota Water Users, East River Electric, & Nat'l Water Resources Assn. to Appellees Motions to Dismiss w/others
Oct. 12	ORDER: We remand 1674 & 1675 to the district court for determination of whether the action is now moot. We retain jurisdiction. w/others
1985	
Feb. 25	ORDER: This matter is set for arg. on Tues., 4/9/85, at 3:00 p.m. in St. Louis. Arg. will be limited to the issue of mootness. The aplees. States of MO, IA and NE are granted leave to file a single consolidated brief on the issue of mootness. The brief is limited to 30 pages and is due 3/15/85. Appellees, Kansas City Southern Railway, Sierra Club, and Nebraska, Iowa and Rocky Mountain Chapters of the Nat'l Farmers Union, as well as any other party not named in this order supporting dismissal for mootness, may also file a single, consolidated brief on the issue of mootness. This brief is also due 3/15/85 and limited to 30 pages. Appellants, ETSI and Andrews may each file briefs in opposition. These briefs are due 4/1/85. Each brief is limited to 30 pages. Any other party opposing dismissal may join in these briefs. If the court determines after arg. that these appeals are not moot, a briefing schedule will be entered. The Court will also consider the application for leave to take an interlocutory appeal in Misc. 84-8114. w/others
Mar. 18	*BRIEF OF APPLEES* (Kansas City RR Co., Sierra, et al) on mootness
" "	*BRIEF OF APPELLEES* (State of Missouri, et al) on mootness

DATE	FILINGS—PROCEEDINGS
1985	
" "	*AFFIDAVIT of Eliza Ovrom*
Mar 19	*Transferred to April Session* in St. Louis. w/ others
Apr. 9	ARGUED AND SUBMITTED IN ST. LOUIS *ON THE ISSUE OF MOOTNESS ONLY* TO JUDGES BRIGHT, J. R. GIBSON, and FAGG. Ms. Eliza Ovrom (AAG of Iowa) for appellees (who are movants on motion to dismiss); Mr. Fred R. Disheroon (Just. Dept.) for appellants and Mr. James Hourihan for appellant (Energy Transportation Systems) (who are both respondents as to the motion to dismiss on mootness). Rebuttal by Mr. Stephen E. Roady (for private appellees). Recorded. w/84-1674/75/1719/21.
Apr. 12	Received copy of 28(j) correspondence from counsel for appellees/cr. appellants. (O.K. per L.P.) —TO COURT. w/1675/1676/1719/1721/ Misc. 84-8114. rh
Apr. 22	ORDER: Order of the dist. ct. that this appeal is not moot is affirmed. Appellees have 30 days to file briefs with this Court and appellants may file reply briefs w/in time provided in FRAP 31. (UNPUBLISHED) (with all numbers)
May 3	MOTION of (States) to renew petition for permission to appeal w/others
May 9	ORDER: The petition for permission to appeal under 28 U.S.C. § 1292(b) filed by the Kansas City Southern Railway Co., State of Iowa, State of Missouri and State of Nebraska are granted. This group of appeals and cross-appeals are set for argument on Tuesday, August 20, 1985, at 9:00 a.m. in St. Paul, Minnesota. w/others
May 20	MOTION BY APLEE/CR-APLNT (State of MO) for ext. of time to file reply brief, MOTION GRANTED TO & INCL. 5/24/85 On 5/23/85

DATE	FILINGS—PROCEEDINGS
1985	
May 28	BRIEF APPELLEES (State of MO, IA and NE) w/84-1674/1719/1721
June 3	MOTION BY APLNT for ext. of time to file reply brief
June 7	On Aplnt ETSI's motion, ETSI and Andrew, et al are granted to June 14 to file their reply brief
June 17	REPLY BRIEF OF FEDERAL APPELLANTS (Illegible)
June 14	REPLY BRIEF FOR ENERGY TRANSPORTATION SYSTEMS, INC. w/1675/1719/1721
July 3	REPLY BRIEF FOR STATES OF MISSOURI, IOWA AND NEBRASKA: w/ser 7/1 w/1674, 1675, 1719, 1721
July 22	JOINT APPENDIX, VOLS. 1 & 2. w/all numbers
Aug. 16	NOTIFICATION OF RELATED CASE and filing of original action in the U. S. Supreme Court. (w/84-1674) cg
Aug. 19	Motion for leave to file complaint, complaint & brief in support of motion for leave to file complaint. cg
Aug. 19	APPENDICES A. B. C & D to motion for leave. cg
Aug. 19	Received additional citation from counsel for State of Iowa. cg
Aug. 20	ARGUED & SUBMITTED TO JUDGES J. GIBSON, BRIGHT AND FAGG IN ST. LOUIS, MO. Fred Disneroon for U.S. parties, James A. Hourihan for ETSI Elizabeth Osenbaugh, for State appellees, Stephen Roady, for K.C. RR and Sierra appellees. Mr. Disheroon and Mr. Hourihan on Rebuttal. RECORDED w/all others. (cm)

DATE	FILINGS—PROCEEDINGS
1985	
Aug. 19	Received copy of 28(j) correspondence from counsel for State appellees. (O.K. per L.P.)—rh —TO COURT.
Aug. 27	Motion of counsel for the State of Iowa, requesting leave to cite additional documents after oral argument. Also leave to file a further brief in the matter. rh
Sept. 24	ORDER: The request of the State of Iowa to furnish additional citations granted. All parties may file on or before 9/30/85 a filing not to exceed 3 pages on the citations. Additional argument will not be allowed. (UNPUBLISHED) w/all numbers) cg
Oct. 1	ETSI's Submission in Response to the Court's Order of Sept. 24, 1985. w/others
Oct. 1	Response of Appellees to Order of Sept. 24, 1985 w/others
Oct. 4	Response of Federal Appellants to the Court's Sept. 24, 1985 Order w/others
Oct. 23	Rec'd Supreme Court Brief of Defendants in Opposition to Motion for Leave to File Complaint and Appendix w/others
Nov. 4	Received Reply Brief in Support of Motion for Leave to File Complaint
1986	
Mar. 13	OPINION BY John R. Gibson PUBLISHED DISSENT by Bright w/all nos.
Mar. 13	JUDGMENT: Judgment of dist ct is affirmed in accord w/opinion. w/all

DATE	FILINGS—PROCEEDINGS
1986	
March 13	ORDER: Opinion filed this date includes the disposition of case No. 85-1593. The opinion is hereby modified to include case 85-1593. (w/case no. 85-1593/84-1674/1675/1719/1721) cg
Mar. 28	APPELLEES/CROSS APPELLANTS, STATE OF MISSOURI, IOWA AND NEBRASKA, BILL OF COSTS. w/service. w/1674/1675/1719/1721. rh
Apr. 25	RESPONSE OF PRIVATE APPELLEES TO FEDERAL APPELLANTS' OBJECTION TO BILL OF COSTS. w/service. w/1674, et al. rh
Apr. 28	PETITION APPELLANTS', ENERGY TRANSPORTATION SYSTEMS, INC., FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC. w/service. w/1674, et al. rh
Apr. 30	PETITION APPELLANTS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC w/service. w/1674, et al. rh
May 5	ORDER: The bill of costs submitted by appellees Kansas City Southern Railway Company, et al., has been considered by the Court, and is denied. w/1674/1675/1719/1720/1721-NE. rh.
May 15	ORDER: Appellees' motion for extension of time to file response to the petitions for rehearing en banc filed herein is granted. Appellees may have to and including June 2, 1986 to file response. w/1674/1675/1719/1721. rh
May 13	MOTION APPELLEES FOR ENLARGEMENT OF TIME IN WHICH TO RESPOND TO THE PETITION FOR REHEARING. w/service. w/1674/1675/1719/1721. rh
May 30	APPELLEES' RESPONSE TO APPELLANTS' PETITION FOR REHEARING. w/service. w/1674/1675/1719/1721. rh

DATE	FILINGS—PROCEEDINGS
1986	
June 2	APPELLEES'S STATES, MISSOURI, IOWA AND NEBRASKA RESPONSE TO PETITION FOR REHEARING EN BANC. w/service. w/ 1674/1675/1719/1721. rh
July 10	ORDER: APPELLANTS' petitions for rehearing en banc have been considered by the Court and are denied. Judges Donald P. Lay, Gerald W. Heaney, Theodore McMillian, Roger L. Wollman, and Frank Magill would have granted the petitions. Petitions for rehearing by the panel are also denied. w/others eh
July 22	MANDATE ISSUED w/others eh
July 28	RECEIPT FOR MANDATE. w/others. rmh

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1721

THE STATE OF MISSOURI, *et al.*,
Appellants

v.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Appellees

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1984	
June 6	Docketed cross appeal
" "	Certified copies of notice of cross appeal; docket entries and orders rec'd from District Court. (1)
June 6	BRIEFING SCHEDULE: DR aplnt/aplee (Fed. Govt. ETS) and DR apee/cr. aplnt (states) due 6/14/84, clerk's record 6/25/84 or joint appendix due 7/5/84 tr. due 6/25/84, brief aplnt (Fed/ETS due 7/5/84, brief aplee/cr. aplnt (States) due 8/6/84, brief aplees KCSRwy/Sierra, et al due 8/6/84, reply aplnt/cr. aplee (Fed/ETS) due 8/20/84, reply brief/cr. aplnt (States) due 9/3/84 w/others.
June 11	Appearance for State of Missouri (2)
June 15	MOTION of aplees for ext. of time to designate record MOTION GRANTED 10 days after aplnt designates. NO EXT. OF BRIEFING SCHEDULE on 6/15/84 w/others

DATE	FILINGS—PROCEEDINGS
1984	
June 18	Appearance for appellee (3)
June 21	Appearance for federal appellees (4)
July 5	*BRIEF APPELLANT* (ETSI) w/others
July 5	*BRIEF AMICUS CURIAE* (State of South Dakota) w/others
July 10	*BRIEF APPELLANT* (Govt) w/others
July 25	TO SCREENING w/1674,5,1719,20/30 min
Aug. 2	Motion for Extension of Time and Memorandum in Support Thereof w/others
Aug. 3	Notice of Private appellees Kansas City Southern Railway Co., The Sierra Club, & the Iowa and Nebraska Chapters of the Nat'l Farmers Union Concerning Request for Extension of Time w/others
Aug. 6	Petition for Permission to Appeal Interlocutory Order Certified by District Court w/others
Aug 10	FEDERAL APPELLANTS' response to Appellee States' motion for extension of time w/service w/all nos.
Aug 15	Transferred to September session. At St. Louis, Mo. 16745/1719,20
Aug. 16	ORDER: Motion of Missouri, Iowa, and Nebraska for permission to appeal interlocutory orders certified by the district court and filed on 8/6/84 is denied without prejudice pending consideration of a suggestion of mootness which may be made by the parties in relation to the appeal from an injunction by the district court dated 5/3/84. The motion of Kansas City Southern RR Co. for permission to appeal interlocutory orders is also denied without prejudice for the reason stated above. The motion for ext. of

DATE	FILINGS—PROCEEDINGS
1984	
	time is granted and the appeals from the injunction of the district court dated 5/3/84 are stricken from the calendar of the Sept. Session of this court. The court requests that any suggestions of mootness of the case and any opposition to such suggestions be promptly filed by interested parties w/all others.
Aug. 20	REPLY of federal appellants to petition by states to appeal interlocutory order. (w/all other numbers) cg
Aug. 31	Motion to Dismiss ETSI's Appeal w/others
Aug. 31	Suggestions of Mootness w/others
Aug. 31	States' Memorandum on Mootness and Ripeness w/others
Aug. 31	Affidavit of Elizabeth M. Osenbaugh w/others
Aug. 31	Appendix to Motion to Dismiss w/others
Aug. 31	Motion of Appellees to Dismiss Appeal as Moot or Unripe w/others
Aug. 31	Memorandum in Support of Motion to Dismiss as Moot or Unripe
Aug. 31	Exhibits to Memorandum w/others
Aug. 31	Motion to Dismiss as Moot on Behalf of Appellees w/others
Aug. 31	Memorandum in Support of Motion to Dismiss w/others
Sept. 17	RESPONSE of Amicus Curiae State of SD in Opposition to Motion of Plaintiffs-Appellees to Dismiss. w/service. w/84-1674/75/1719/20.
Sept. 25	Appellant's Opposition to the Motions of All Appellees to Dismiss

DATE	FILINGS—PROCEEDINGS
1984	
Sept. 25	Appellant's Opposition to the Motions of all Appellees to Dismiss
Sept. 28	Response of Amici Mid-West Electric, North Dakota Water Users, East River Electric, & Nat'l Resources Assn. to Appellees Motions to Dismiss w/others
Oct. 12	ORDER: We remand 1674 & 1675 to the district court for determination of whether the action is now moot. We retain jurisdiction. w/ others (UNPUB)
1985	
Feb. 25	ORDER: This matter is set for arg. on Tues., 4/9/85, at 3:00 p.m. in St. Louis. Arg. will be limited to the issue of mootness. The aplees States of MO, IA and NE are granted leave to file a single consolidated brief on the issue of mootness. The brief is limited to 30 pages and is due 3/15/85. Appellees, Kansas City Southern Railway, Sierra Club, and Nebraska, Iowa and Rocky Mountain Chapters of the Nat'l Farmers Union, as well as any other party not named in this order supporting dismissal for mootness, may also file a single, consolidated brief on the issue of mootness. This brief is also due 3/15/85 and limited to 30 pages. Appellants, ETSI and Andrews may each file briefs in opposition. These briefs are due 4/1/85. Each brief is limited to 30 pages. Any other party opposing dismissal may join in these briefs. If the court determines after arg. that these appeals are not moot, a briefing schedule will be entered. The Court will also consider the application for leave to take an interlocutory appeal in Misc. 84-8114. w/others
Mar. 18	*BRIEF OF APLEES* (Kansas City RR Co., Sierra, et al) on mootness

DATE	FILINGS—PROCEEDINGS
1985	
" "	*BRIEF OF APLEES* (State of Missouri, et al) on mootness
" "	*AFFIDAVIT of Eliza Ovrom*
Mar 19	*Transferred to April Session* in St. Louis. w/ others
Apr. 9	ARGUED AND SUBMITTED IN ST. LOUIS *ON THE ISSUE OF MOOTNESS ONLY* TO JUDGES BRIGHT, J. R. GIBSON, and FAGG. Ms. Eliza Ovrom (AAG of Iowa) for appellees (who are movants on motion to dismiss); Mr. Fred R. Disheroon (Just. Dept.) for appellants and Mr. James A. Hourihan for appellant (Energy Transportation Systems) (who are both respondents as to the motion to dismiss on mootness). Rebuttal by Mr. Stephen E. Roady (for private appellees). Recorded. w/84-1674/75/1719/20.
Apr. 12	Received copy of 28(j) correspondence from counsel for appellees/cr. appellants. (O.K. per L.P.) —TO COURT. w/1675/1676/1719/1720/ Misc. 84-8114. rh
Apr. 22	ORDER: Order of the dist. ct. that this appeal is not moot is affirmed. Appellees have 30 days to file briefs with this Court and appellants may file reply briefs w/in time provided in FRAP 31. (UNPUBLISHED) (with all numbers)
May 3	MOTION of (States) to renew petition for permission to appeal w/others
May 9	ORDER: The petition for permission to appeal under 28 U.S.C. § 1292(b) filed by the Kansas City Southern Railway Co., State of Iowa, State of Missouri and State of Nebraska are granted. This group of appeals and cross-appeals are set for argument on Tuesday, August 20, 1985, at 9:00 a.m. in St. Paul, Minnesota. w/others

DATE	FILINGS—PROCEEDINGS
1985	
May 20	MOTION BY APLEE/Cr-Aplnt for ext. of time to file reply brief, MOTION GRANTED TO & INCL. 5/24/85 on 5/23/85
May 28	*BRIEF APPELLEES* (State of MO, IA and NE) w/84-1674/1719/1720
June 3	MOTION BY APLNT for ext. of time to file reply brief
June 7	On Aplnt ETSI's motion, ETSI and Andrew, et al are granted to June 14, 1985 to file their reply brief
June 17	*REPLY BRIEF OF FEDERAL APPELLANTS* w/1674/1719/1720
June 14	*REPLY BRIEF FOR ENERGY TRANSPORTATION SYSTEMS, INC.* w/1675/1719/1720
July 3	*REPLY BRIEF FOR STATES OF MISSOURI, IOWA AND NEBRASKA*: w/ser 7/1 w/1674, 1675, 1719, 1720
Aug. 16	NOTIFICATION OF RELATED CASE and filing of original action in the U. S. Supreme Court. (w/84-1674) cg
July 22	JOINT APPENDIX, VOLS. 1 & 2. w/all numbers
Aug. 19	Motion for leave to file complaint, complaint & brief in support of motion for leave to file complaint. cg
Aug. 19	APPENDICES A. B. C & D to motion for leave. cg
Aug. 19	Received additional citation from counsel for State of Iowa. cg
Aug. 20	ARGUED & SUBMITTED TO JUDGES J. GIBSON, BRIGHT AND FAGG IN ST. LOUIS, MO. Fred Disheroon for U.S. parties, James A. Hour-

DATE	FILINGS—PROCEEDINGS
1985	
	ihan for ETSI, Elizabeth Osenbaugh, for State appellees, Stephen Roady, for K.C. RR and Sierra appellees. Mr. Disheroon and Mr. Hourihan on Rebuttal. RECORDED w/all others.
Aug. 19	Received copy of 28(j) correspondence from counsel for State appellees. (O.K. per L.P.)—rh—TO COURT.
Aug. 27	Motion of counsel for the State of Iowa, requesting leave to cite additional documents after oral argument. Also leave to file a further brief in the matter. rh.
Sept. 24	ORDER: The request of the State of Iowa to furnish additional citations granted. All parties may file on or before 9/30/85 a filing not to exceed 3 pages on the citations. Additional argument will not be allowed. (UNPUBLISHED) (w/all numbers) cg
Oct. 1	ETSI's Submission in Response to the Court's Order of Sept. 24, 1985. w/others
Oct. 1	Response of Appellees to Order of Sept. 24, 1985 w/others
Oct. 4	Response of Federal Appellants to the Court's Sept. 24, 1985 Order w/others
Oct. 23	Rec'd Supreme Court Brief of Defendants in Opposition to Motion for Leave to File Complaint and Appendix w/others
Nov. 4	Received Reply Brief in Support of Motion for Leave to File Complaint
1986	
Mar. 13	OPINION BY John R. Gibson PUBLISHED DISSENT by Bright w/all nos.

DATE	FILINGS—PROCEEDINGS
1986	
Mar. 13	JUDGMENT: Judgment of dist ct is affirmed in accord w/opinion. w/all
March 13	ORDER: Opinion filed this date includes the disposition of case No. 85-1593. The opinion is hereby modified to include case 85-1593. (w/Case No. 85-1593 and 84/1674/1675/1719/and 1720) cg
Mar. 28	APPELLEE/CROSS APPELLANTS, STATE OF MISSOURI, IOWA AND NEBRASKA, BILL OF COSTS. w/service. w/1674/1675/1719/1720. rh.
Apr. 25	RESPONSE OF PRIVATE APPELLEES TO FEDERAL APPELLANTS' OBJECTION TO BILL OF COSTS. w service. w 1674/1675/1719/1720-NE. rh (RECEIVED)
Apr. 28	PETITION APPELLANTS', ENERGY TRANSPORTATION SYSTEMS, INC., FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC. w/service. w/1674/1675/1719/1120. rh
Apr. 30	PETITION APPELLANTS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC. w/service. w/1674/1675/1719/1720. rh
May 5	ORDER: The bill of costs submitted by appellees Kansas City Southern Railway Company, et al., has been considered by the Court, and is denied. w/1674/1675/1719/1720-NE. rh
May 15	ORDER: Appellees' motion for extension of time to file response to the petitions for rehearing en banc filed herein is granted. Appellees may have to and including June 2, 1986 to file response. w/1674/1675/1719/1720. rh

DATE	FILINGS—PROCEEDINGS
1986	
May 13	MOTION APPELLEES FOR ENLARGEMENT OF TIME IN WHICH TO RESPOND TO THE PETITION FOR REHEARING. w/service. w/ 1674/w/1675/1719/1720. rh
May 30	APPELLEES' RESPONSE TO APPELLANTS' PETITION FOR REHEARING. w/service. w/ 1674/1675/1719/1720. rh
June 2	APPELLEES' STATES, MISSOURI, IOWA AND NEBRASKA RESPONSE TO PETITION FOR REHEARING EN BANC. w/service. w/ 1674/1675/1719/1720. rh
July 10	ORDER: APPELLANTS' petitions for rehearing en banc have been considered by the Court and are denied. Judges Donald P. Lay, Gerald W. Heaney, Theodore McMillian, Roger L. Wollman, and Frank Magill would have granted the petitions. Petitions for rehearing by the panel are also denied. w/others eh
July 22	MANDATE ISSUED w/others eh
July 28	RECEIPT FOR MANDATE. w/others. rmh

ADMINISTRATIVE RECORD 900065

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

[Nov. 27, 1974]

Memorandum

To: Secretary of the Interior

From: Solicitor

Subject: Authority of Secretary of the Interior to Market Municipal and Industrial Water from Missouri River Basin, Pick-Sloan Project

You have inquired whether you have the authority to market water from the six mainstem reservoirs in the Missouri River Basin, Pick-Sloan Project, for municipal and industrial purposes. The water that would be sold is that for which storage capacity was provided in said reservoirs for irrigation and for the probable extent of future irrigation, but which it will not be possible to market for the latter purposes during the terms of the proposed M&I contracts.

It is my conclusion that you have such authority under Section 9 of the Flood Control Act of December 22, 1944, 58 Stat. 891. Section 9 authorized the construction by the Corps of Engineers and the Bureau of Reclamation of a comprehensive plan for the development of the Missouri River Basin, including the mainstem and its tributaries. This is the so-called "Pick-Sloan Project," named for the respective Corps of Engineers and Bureau of Reclamation authors of the two studies upon which the legislation was based. The Pick plan, set forth in H. Doc. 475, 78th Cong., 2d sess., was the Corps study, and the Sloan plan, set forth in S. Doc. 191, 78th Cong., 2d sess., was the Bureau study. These were revised and coordinated by S. Doc. 247, 78th Cong., 2d sess.

Section 9 of the 1944 Flood Control Act provides as follows:

(a) The general comprehensive plans set forth in House Document 475 and Senate Document 191, Seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.

(b) The general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938, as modified by subsequent Acts, is hereby expanded to include the works referred to in paragraph (a) to be undertaken by the War Department; and said expanded plan shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers.

(c) Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), except that irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands.

(d) In addition to previous authorizations there is hereby authorized to be appropriated the sum of $200,000,000 for the partial accomplishment of the

works to be undertaken under said expanded plans by the Corps of Engineers.

(e) The sum of $200,000,000 is hereby authorized to be appropriated for the partial accomplishment of the works to be undertaken under said plans by the Secretary of the Interior. (58 Stat. 891)

Under this authority the Corps has six dams and reservoirs on the mainstem of the Missouri River. This includes Fort Peck, the construction of which predated the Act but the operation of which is integrated in the Pick-Sloan Project, as contemplated in Senate Document 247 (p. 2). Under S. Doc. 247 (p. 1) the Corps was given the responsibility for determining reservoir capacities for flood control and navigation, and the Bureau was given the responsibility for determining reservoir capacities for irrigation and the probable extent of future irrigation.

In the Pick plan (H. Doc. 475, p. 28-29) the purposes for the mainstem reservoirs were described as follows:

> In addition to providing flood-control benefits on the Missouri and Mississippi Rivers, the comprehensive plan would also provide for the most efficient utilization of the waters of the Missouri River Basin for all purposes, including irrigation, navigation, power, *domestic and sanitary* purposes, wildlife, and recreation [Emphasis].

The concept of multiple-purpose use was further developed by the Bureau's comments on the Pick plan (H. Doc. 475, p. 7), the substance of which was also repeated in the Sloan plan (S. Doc. 191, p. 10):

> In planning the control and utilization of the waters of the Missouri Basin, and widest range of multiple benefits should be sought in each feature or group of features. All reservoirs included in the comprehensive plan, including Fort Peck, should be op-

> erated to obtain the maximum benefits in common for flood control, navigation, irrigation, power generation, and other water-conservation activities, *including, but not limited to,* utilization for fish and wildlife preservation, recreation, pollution abatement, maintenance of surface and ground water levels, silt control, and *domestic and industrial purposes.* To the extent, however, that several functions of water control and utilization are conflicting, preference should be given to functions which contribute most significantly to the welfare and livelihood of the largest number of people. It is, for example, the view of the Bureau of Reclamation, that the waters of the Missouri River and its tributaries west of or entering above Sioux City are more useful to more people if utilized for *domestic,* agricultural, and *industrial* purposes than for navigation-improvement purposes. To the extent that these uses are competitive, *domestic,* agricultural, *and industrial uses should have preference* [Emphasis].

The Bureau's concluding recommendation was actually incorporated in Section 1(b) of the 1944 Flood Control Act, 58 Stat. 887, as follows:

> The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

In the Sloan plan, the project purposes were further described as follows (S. Doc. 191, p. 10):

> It is a comprehensive plan for the highest beneficial use of the waters of the basin. It provides for flood

> control, navigation, irrigation, power development, *domestic and industrial water supplies* [Emphasis], silt control, recreational use of waters, conservation of fish and wildlife, and pollution abatement, and will assist in the restoration and maintenance of ground-water levels and inland lakes.

In accordance with the foregoing plans, capacity was included by the Bureau in the mainstem reservoirs for municipal and industrial purposes, as well as for irrigation and the probable extent of future irrigation, and the benefits and allocations of costs were determined under Reclamation law, as provided for in Section 9(c) of the 1944 Flood Control Act. In the Sloan plan (S. Doc. 191, p. 13) the principal contribution to municipal and industrial water supplies was viewed as the increase in the surface and ground-water supplies that were then being used for those purposes.

It is clear that where capacity has been included in the mainstem reservoirs at the request of the Bureau of Reclamation for irrigation and municipal and industrial purposes, the water available from such capacity is to be marketed for such purposes by the Bureau of Reclamation under the Reclamation laws, just as the hydroelectric power generated at those reservoirs is now being marketed by the Bureau of Reclamation under the Reclamation laws.

The Sloan plan outlined the arrangements as follows (S. Doc. 191, p. 11):

> The agency with primary interest in the dominant function of any feature proposed in the plan should construct and operate that feature, giving full recognition, in the design, construction, and operation, to the needs of other agencies with minor interests. All reservoirs where flood control and navigation are dominant should be operated by the Corps of Engineers, and where the flood control and navigation

> functions are minor, the reservoirs should be operated in accordance with regulations of the Corps so far as flood control and navigation are concerned. All irrigation features should be operated by the Bureau of Reclamation or its agents. All reservoirs in which irrigation, restoration of surface and ground waters [municipal and industrial supplies], or power, is dominant, should be operated by the Bureau of Reclamation. Where these functions are minor, the reservoirs should be operated under regulations of the Bureau of Reclamation so far as such functions are concerned.

These arrangements were translated into the 1944 Flood Control Act by Subsection 9(c), which provides that the reclamation and power features "shall be governed by the Federal Reclamation Laws."

Although the Sloan plan (S. Doc. 191, p. 13) provides that water will be diverted from some of the mainstem reservoirs of the project for municipal and industrial purposes, it was not contemplated in the original plan that every mainstem reservoir would be used for such purposes. However, you now inform me that it may not be feasible within the next 40 years and more to use all of the capacity provided for irrigation in the mainstem reservoirs, and you have inquired whether you have authority, in the interim, also to market for municipal and industrial purposes the water available from the irrigation capacity. On the basis of a determination by you that within the times for which the M&I contracts are to be written it will not be feasible to market such water for irrigation purposes and that the efficiency of the project for irrigation purposes will not thereby be impaired, you would, in my opinion, have authority to market such water for municipal and industrial purposes.

Under the Reclamation laws, particularly Section 9(c) of the Reclamation Project Act of August 4, 1939, 43 U.S.C. 485h(c), you have express authority to market

water for municipal and industrial uses, along with your authority under Section 9(d) and Section 9(e) of said Act to market water for irrigation uses.

Section 9(c) of the 1939 Reclamation Project Act, after authorizing the Secretary of the Interior to enter into contracts to furnish water for municipal water supply or miscellaneous purposes, further provides:

> No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.

You are, accordingly, clearly authorized to make M&I contracts if you find that they do not impair the efficiency of the project for irrigation purposes.

Where because of changed circumstances it is not feasible to market, within the time periods originally contemplated, the amount of water available from the reservoir capacity provided for irrigation and the probable extent of future irrigation, you have not only the authority but, in my opinion, the responsibility as well, to apply that water to another beneficial use, such as municipal and industrial purposes. In the light of the objectives stated in the Pick-Sloan plans of comprehensive resource development and of best resource use, it must be inferred that Congress did not intend the opportunity to be lost to put the irrigation water to another beneficial use during the period that it was not feasible to use it for irrigation purposes.

If such water is diverted for municipal and industrial purposes, it might not be available for the generation of as much hydroelectric power as could otherwise be generated if the water were to be passed through all of the turbines of all of the mainstem reservoirs. However, the same would have been true if the water had been diverted for irrigation use, as was originally contemplated when

the storage capacity in the reservoirs was authorized. It cannot, therefore, be said that the diversion for municipal and industrial purposes will be inconsistent with the authorized development of hydroelectric power.

Moreover, as Senate Document 247 said (p. 1):

> Both agencies recognize the importance of the fullest development of the potential hydroelectric power in the basin *consistent with the other beneficial uses of water* [Emphasis).

Therefore, the decision as to whether it would be more beneficial to use such water for municipal and industrial purposes than for the supplemental generation of hydroelectric power would be a matter of sound administrative discretion.

/s/ Kent Frizzell
Solicitor

cc: Assistant Secretary—Land and Water Resources
Commissioner of Reclamation
Regional Solicitor, Billings

Solicitor's reading file
Mr. London
E&R Division Files
Docket
Reading—ELondon:lel 11-27-74

ADMINISTRATIVE RECORD 900407

DEPARTMENT OF THE ARMY
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20319

16 Dec. 1974

MEMORANDUM FOR THE CHIEF,
OFFICE OF CIVIL FUNCTIONS

SUBJECT: Marketing of Missouri River Water for
/s/ Jack Coal Gasification

I have reviewed at your request the conflicting opinions of the General Counsel, OCE, and the Assistant Solicitor, Department of Interior, regarding whether either the Secretary of the Army or the Secretary of Interior has statutory authority to contract for the sale of water from the six reservoirs in the main stem of the Missouri River constructed and maintained by the Corps of Engineers pursuant to the Flood Control Act of 1944, sec. 9, P.L. 78-534, 58 Stat. 891.

Conclusion

I have concluded that I cannot endorse the opinion of the General Counsel, OCE, that neither secretary possesses the requisite authority. As a caveat, it should be noted that this question has never been directly addressed by either Congress or the courts. As a result, the legislation is subject to differing interpretations. It should be understood that my conclusion is simply that the legislation is sufficiently ambiguous that I cannot concur with the OCE opinion that the water cannot be marketed jointly by the two secretaries for the purpose of use in coal gasification. It should further be noted that this opinion relates only to the statutory authority for marketing of water for coal gasification otherwise available for that use; no opinion is expressed with regard to the relation-

ship of state water rights law to the sale of water for such a use.

For these reasons, notwithstanding my opinion that there is arguable authority for the Secretaries of Army and Interior, acting jointly, to market water from the main stem reservoirs for this purpose, I strongly advise that legislation establishing a systematic marketing program be sought. In view of the strongly competing interests in the water of the Missouri River, as well as the strong opposition by environmental groups to coal gasification and concomitant strip mining, *see Sierra Club* v. *Morton*, Civil Action No. 1182-73 (D.D.C.), appeal pending (D.C. Cir.), we can anticipate that any effort to market the water in reliance on statutory authority which does not directly and clearly authorize such marketing will be productive of extensive litigation which would considerably delay execution of any contracts. Since execution of contracts must be delayed in any event pending compliance with NEPA, the concurrent delay associated with enactment of authorizing legislation is less likely to postpone the ultimate date for delivery of the water than delay engendered by litigation commencing at that point where the first contract is about to be executed. Although I therefore consider legislation advisable, I can see no objection in the interim to proceeding on the basis of already existing authority and designating the Bureau of Reclamation to act as the agent of the Secretary of Interior and Secretary of the Army in the negotiation of contracts and the preparation of an EIS, so long as it is agreed that no contracts shall be executed without the approval of the Secretary of the Army and the Secretary of Interior. I, therefore, provide as Enclosure 1 a draft Memorandum of Understanding which I could recommend that the Secretary sign.

Discussion

The six main stem reservoirs in the Missouri River were constructed by the Corps of Engineers pursuant to

section 9 of the Flood Control Act of 1944, Pub. L. 78-534, 58 Stat. 891. That act authorized construction of the main stem reservoirs, along with a number of tributary reservoirs to be constructed by the Department of Interior, as proposed in the general comprehensive plans set forth by the Corps of Engineers in House Document 475 and by the Bureau of Reclamation in Senate Document 191, 78th Congress, and coordinated and revised by Senate Document 247. *See id.*, § 9(a), 58 Stat. 891. This comprehensive plan has become known as the Pick-Sloan Plan, after the authors of the two separate plans of the Corps and the Bureau.

Each of the separate plans set forth in considerable detail the justification for the particular reservoirs proposed. In consolidating these proposals, Senate Document 247 states which reservoirs were authorized for construction and the approximate capacity of each. In stating the proposed capacity of each reservoir, the Pick-Sloan plan identified the uses contemplated for the water in each reservoir and in very general terms related the capacity proposed to those uses. Thus, for example, in recommending the construction of the Oahe Dam near Pierre, South Dakota, with a capacity of 19,600,000 acre-feet as recommended in Senate Document 191, rather than 6,000,000 acre-feet as recommended in House Document 475, the Pick-Sloan plan noted that,

> The high Oahe Dam is required in connection with the irrigation of 750,000 acres of land in the James River Basin as well as to provide useful storage for flood control, navigation, the development of hydroelectric power, and other purposes. If the Oahe Reservoir is constructed to the elevation proposed in Senate Document 191, Seventy-eighth Congress, second session, a greater storage capacity will be provided than contemplated in the low Oahe and Oak Creek Reservoirs at considerably less cost.

It is significant that the total capacity for the main stem reservoirs recommended in the Pick-Sloan plan and approved by Congress was 42,150,000 acre-feet, as compared to 35,200 acre-feet in the Corps (Pick) Plan, H. Doc. 475, and 24,950 acre-feet in the Bureau (Sloan) Plan, S. Doc. 191. The joint Pick-Sloan Plan concluded that,

> The use of the Garrison, high Oahe, Big Bend, Fort Randall, and Gavins Point Dams and Reservoirs as outlined above and agreed upon in the joint engineering report will provide the desired degree of flood control, supply the needs of irrigation as well as furnish cyclic storage for navigation during prolonged drought periods. The plan also utilizes practically all of the available power head in the Missouri River between the mouth of the Yellowstone River and the Gavins Point Dam.

In addition to determining the capacity of the reservoirs to be constructed, the Pick-Sloan Plan assigned responsibilities for determining how the waters stored in the reservoirs should be used. To this end, the plan enunciated the following "basic principles:"

> (a) The Corps of Engineers should have the responsibility for determining main stem reservoir capacities and capacities of tributary reservoirs for flood control and navigation.
>
> (b) The Bureau of Reclamation should have the responsibility for determining the reservoir capacities on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development.
>
> (c) Both agencies recognize the importance of the fullest development of the potential hydroelectric power in the basin consistent with the other beneficial uses of water.

The legislation itself further detailed the priorities for use of the water and the methods by which the water was to be committed to particular uses. Section 1(b) of the 1944 Act expressly provided that the use of the storage for navigation was to be subordinate to "beneficial consumptive uses":

> (b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

Further, section 9(c) made plain that the use of the storage for "reclamation and power" purposes falls under the aegis of the Secretary of Interior. In this regard, the Act provided,

> Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), except that irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands.

Finally, the Act granted the Secretary of the Army general authority

> to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such

> terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: Provided, That no contracts for such water shall adversely affect then existing lawful use of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.

Id., § 6.

As I understand the views of the General Counsel, OCE, no water in the main stem reservoirs would be available for sale for municipal or industrial purposes, including coal gasification, so long as it is otherwise being used for the purposes specifically identified in the Pick-Sloan plan. These, of course, are: flood control, navigation, irrigation, and power. Since all water not used consumptively for irrigation or otherwise held within the reservoirs for flood control or navigation purposes, is currently run through the generators to produce hydroelectric power, it is his view that no water may be sold for municipal and industrial purposes.

Reclamation law grants the Secretary of Interior general authority to market water for municipal and industrial purposes so long as such marketing "will not impair the efficiency of the project for irrigation purposes." 42 U.S.C. § 485h. Since the Act of 1944 states that, "Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayment by water users, made in Said House and Senate Documents, the reclamation and power developments undertaken by the Secretary of Interior shall be governed by the Federal Reclamation laws," it would appear that the Secretary of Interior could market the water for municipal and industrial purposes so long as he determines that doing so would not interfere with irrigation, unless there is something in the Pick-Sloan plan approved by Congress foreclosing such marketing.

As a reading of the language of the Act and the Pick-Sloan plan quoted above indicates, the Missouri River reservoir system was broadly conceived. Although the capacities of the various reservoirs were based on the expected needs of the basin primarily with regard to flood control, irrigation, navigation, and hydroelectric power, no specific allocation as between these various purposes was attempted. Rather, the needs of each category were left to be determined, in the case of flood control and navigation, by the Secretary of the Army, and in the case of irrigation, by the Secretary of Interior. Moreover, ample capacity beyond that expected to be needed for flood control, navigation, and irrigation was provided so as to assure that the reservoir system could "utilize practically all of the available power head in the Missouri River . . . ." S. Doc. 247, p. 4.

Where there might be conflicts between various uses, the Act and the plan it approved established certain priorities. These priorities were not stated narrowly, in terms of the uses of the storage identified specifically in the Pick-Sloan plan. Rather, the Act broadly stated that navigation was to be subordinate to all beneficial consumptive uses. Likewise, the development of hydroelectric power was to be the fullest possible "consistent with the other beneficial uses of water." In view of this language, it would not appear that Congress intended that the use of storage capacity for power or navigation should be asserted as a barrier to the use of that storage for another beneficial use of the water pursuant to a general authority for use of water for such a purpose.

Especially in view of the assignment of primary responsibility for power development to the Secretary of Interior, see 43 U.S.C. § 485h; P.L. 78-534, § 5, 58 Stat. 890, I believe that the Department of the Army should consider itself bound by an interpretation of the Pick-Sloan plan on the part of Interior which would treat the goal of fullest development of hydroelectric power as

subordinate to other beneficial uses of water, including those which may not have been contemplated at the time the reservoir system was originally conceived, the opportunity for which has developed subsequently. I therefore conclude that if Interior certifies that the storage proposed to be marketed for industrial purposes in connection with coal gasification "will not impair the efficiency of the project for irrigation," 43 U.S.C. § 485h, the Army should be prepared jointly to cooperate with Interior in determining whether coal gasification presents an opportunity for beneficial use of the water which should take precedence over hydroelectric power, unless it determines, pursuant to its responsibility under S. Doc. 247, that such use would interfere with the operation of the reservoirs for flood control. If the Army and Interior acting individually and jointly are able to make the necessary determinations, I see no legal reason why water from the main stem reservoirs could not be marketed for industrial purposes by the Secretary of Interior pursuant to 43 U.S.C. § 485h.*

If storage is marketed for use in coal gasification, § 9 (c) would appear to require, since the sale would reduce the generation of hydroelectric power and perhaps impair somewhat the navigation benefits of the main stem system, that the price charged for the water be adequate to reimburse the Treasury for the power and navigation revenues foregone, if any.

/s/ Dick
Richard V. Kearney,
Acting General Counsel

---

* I do agree with the General Counsel, OCE, opinion that water for the main stem reservoirs may not be marketed by the Secretary of the Army as "surplus" water under section 6 of the 1944 Act. I further agree that the Secretary of Interior may not market the water from these reservoirs independently.

ADMINISTRATIVE RECORD 900072

MEMORANDUM OF UNDERSTANDING BETWEEN THE SECRETARY OF THE INTERIOR AND THE SECRETARY OF THE ARMY

This Memorandum of Understanding is entered into this 24th day of February, 1975, between the Secretary of the Interior and the Secretary of the Army in order to expedite the use of water for energy development in the Missouri River Basin. The terms hereof apply only to the six main stem reservoirs of the Corps of Engineers on the Missouri River.

1. The Secretary of the Interior shall determine the amounts of water available from the capacity provided in the main stem reservoirs for irrigation and for the probable extent of future irrigation and shall also determine the extent and for what duration such amounts of water will not be needed for irrigation and for the probable extent of future irrigation.

2. The Secretary of the Army shall determine how much of the water determined by the Secretary of the Interior to be excess to present irrigation needs can be made available for industrial uses.

3. The parties hereby agree that the Secretary of the Interior may, pursuant to applicable authorities, both on his own behalf and as agent for the Secretary of the Army, contract for the marketing of water for industrial uses and incidental purposes related thereto from the six main stem reservoirs as will not be needed for irrigation for a given period and as will not interfere with the operation of the reservoirs for flood control; provided, however, that

a. The Secretary of the Army shall retain all operational and managerial control over said reservoirs;

b. Contracts for the marketing of such water shall be executed under the terms of this agreement with full compliance with the requirements of the National Environmental Policy Act;

c. No contract for the marketing of such water shall be executed but on such terms and conditions as are mutually agreeable to the parties hereto; and

d. To the extent such contracts would reduce the quantity of power generated, no contract may be executed unless it has been determined jointly by the parties to this agreement that the proposed marketing for industrial purposes is a beneficial use of the water which should take precedence over hydroelectric power generation.

4. The Secretary of the Interior shall have the lead agency responsibility for compliance with the requirements of the National Environmental Policy Act.

5. This Memorandum of Understanding shall terminate at the end of two years. Contracts executed pursuant to this Memorandum of Understanding shall not be affected by such termination. During the term hereof, the Secretary of the Interior and the Secretary of the Army shall further cooperate in developing a long-range marketing program for municipal and industrial water.

/s/ Rogers C. B. Morton
Secretary of the Interior

/s/ Howard H. Callaway
Secretary of the Army

EXTENSION OF MEMORANDUM OF UNDERSTANDING BETWEEN THE SECRETARY OF THE INTERIOR AND THE SECRETARY OF THE ARMY

We, the undersigned, hereby extend the February 24, 1975, Memorandum of Understanding between the Secretary of the Interior and the Secretary of the Army on Missouri River water marketing until May 1, 1977.

/s/ Thomas S. Kleppe
Secretary of the Interior

/s/ Martin R. Hoffman
Secretary of the Army

MEMORANDUM OF UNDERSTANDING BETWEEN THE SECRETARY OF THE INTERIOR AND THE SECRETARY OF THE ARMY

We, the undersigned, hereby further extend the February 24, 1975, Memorandum of Understanding between the Secretary of the Interior and the Secretary of the Army on Missouri River water marketing until September 1, 1977.

/s/ Cecil D. Andrus
Secretary of the Interior

_____

Secretary of the Army

MEMORANDUM OF UNDERSTANDING AMONG THE SECRETARY OF THE INTERIOR THE SECRETARY OF THE ARMY AND THE SECRETARY OF ENERGY

The Memorandum of Understanding entered into on the 24th day of February 1975, between the Secretary of the Interior and the Secretary of the Army and last extended by mutual consent to September 1, 1977 (copy attached and made a part hereof), is hereby extended to December 31, 1978. The Secretary of Energy concurs in this extension and shall be a party to the purposes identified herein:

The Secretary of the Interior and the Secretary of the Army have fulfilled items 1 and 2 of the February 24, 1975, Memorandum of Understanding (MOU) and have determined that 1 million acre-feet of water surplus to interim irrigation needs can be made available for industrial use. Items 3, 4, and 5 of that MOU represent ongoing work activities associated with contracts and environmental statements and other matters associated with the marketing of water from the six main-stem reservoirs built by the Corps of Engineers on the Missouri River. Item 3.d. of that MOU involves a determination of energy efficiency and, as a consequence, does impact on the responsibities of the Department of Energy established on October 1, 1977.

Subsection 3.d. is hereby modified as follows: "To the extent such contracts would reduce the quantity of power generated, no contract may be executed unless it has been determined jointly by the Secretary of Energy, the Secretary of the Army, and the Secretary of the Interior, that the proposed marketing for industrial purposes is a beneficial use of the water which should take precedence over hydroelectric power generation."

All other provisions of the February 24, 1975, MOU remain as previously established.

/s/ James A. Joseph Secretary of the Interior	4/21/78 Date
/s/ Clifford L. Alexander, Jr. Secretary of the Army	May 17, 1978 Date
/s/ James R. Schlesinger Secretary of Energy	6/19/78 Date

ADMINISTRATIVE RECORD 900089

SECRETARY OF THE ARMY
Washington

18 Mar. 1975

Honorable Rogers C. B. Morton
Secretary of the Interior
Washington, D.C. 20240

Dear Rog:

The Memorandum of Understanding with relation to the Missouri River which we signed recently should permit early negotiations with potential industrial users of water. The MOU is, however, a temporary solution only pending the completion of studies and clarification of outstanding issues relating to legislation, pricing, project formulation and cost allocation.

My greatest concern is that the statutes relating to marketing the water for industrial purposes are unclear. Fortunately, the Chief of Engineers has a current study of the upper Missouri, authorized and funded by the Congress, which will result in recommendations including possible modification of the operations of the six main stem projects. There should also be proposals for legislative authority to support any modifications, including those relating to this marketing effort.

Of course, we will need the help of the Department of the Interior, and I am convinced that with your support, this study will lead to a strengthening of authorities for the long-term use of Missouri River water for industrial purposes.

Sincerely,

/s/ Bo
HOWARD H. CALLAWAY

ADMINISTRATIVE RECORD 900399

DEPARTMENT OF THE ARMY
MISSOURI RIVER DIVISION, CORPS OF ENGINEERS
P.O. Box 103, Downtown Station
Omaha, Nebraska 68101

4 Oct. 1978

MRDPD

Mr. E. R. Wilde
Acting Regional Director
Upper Missouri Region
Bureau of Reclamation
P. O. Box 2553
Billings, Montana 59103

Dear Mr. Wilde:

This responds to your 12 September 1978 letter requesting input to an assessment of the merits of continuing the industrial water marketing program for the main stem reservoirs. As you are aware, this office has been involved in this program, not only as the manager of the system, but also as participants in the ad hoc studies conducted by the Missouri River Basin Commission. I believe we should all recognize that the actions leading to the current MOU between Army and Interior were based on a perception of possible critical needs to be met immediately and, as such, the MOU was considered a temporary device for solving the immediate problem. The immediacy of the problem is somewhat obscure today since not one contract for delivery of water has been executed since the MOU went into effect on 24 February 1975.

We have always expressed reservations on the legality of the water marketing MOU as executed by the respective parties. We did agree, however, that the water to be marketed was surplus to irrigation needs in the near term and that pricing of diverted water could compensate

for lost power revenues. Over the long term, studies, evaluations, and reports should be consummated and recommendations forwarded to the Congress for implementing a water marketing program through a legislated project modification.

We question whether a simple request to basin states will yield a definitive assessment of industrial water needs; moreover, that such need should be supplied from the main stem system as the only alternative to be considered. We believe also that Indian Water Rights issues, including quantification, can not be supplied by BIA in the time frame outlined in your letter. Accordingly, only a full scale study, jointly conducted by the affected states and pertinent Federal agencies, can lead to a mutually agreeable solution. We recommend such an approach. Since the Corps of Engineers does in fact maintain, operate, and manage the system, it would be logical for the Corps to lead such an effort. A ready mechanism for coordinated studies—Federal and States—does exist in the Missouri River Basin Commission.

In summary, we recommend that the current Army-Interior MOU be allowed to expire and that discussions be initiated by our two Departments for undertaking the necessary pre-authorization studies outlined in this letter.

Sincerely,

/s/ C. A. Selleck, Jr.
C. A. SELLECK, JR.
Colonel, Corps of Engineers
Division Engineer

ADMINISTRATIVE RECORD 900204

Contract No. 9-07-60-WS048

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Pick-Sloan Missouri Basin Program

INDUSTRIAL WATER SERVICE CONTRACT BETWEEN THE UNITED STATES AND BASIN ELECTRIC POWER COOPERATIVE

THIS CONTRACT, Made this 28th day of December, 1978, pursuant to the Reclamation Act of 1902 (32 Stat. 388) and acts amendatory thereof and supplementary thereto, and the Flood Control Act of December 22, 1944 (58 Stat. 887), and the Memorandum of Understanding between the Secretary of the Interior and Secretary of the Army as executed on February 24, 1975, between the UNITED STATES OF AMERICA, hereinafter called the United States, acting for this purpose through the officer executing this contract, hereinafter called the Contracting Officer, and the BASIN ELECTRIC POWER COOPERATIVE, with its principal place of business at Bismarck, North Dakota, hereinafter called the Contractor;

* * * *

ADMINISTRATIVE RECORD 900225

Contract No. 0-07-60-WS057

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Pick-Sloan Missouri Basin Program

INDUSTRIAL WATER SERVICE CONTRACT BETWEEN THE UNITED STATES AND ANG COAL GASIFICATION COMPANY

THIS CONTRACT, Made this 9th day of November, 1979, pursuant to the Reclamation Act of 1902 (32 Stat. 388) and acts amendatory thereof and supplementary thereto, and the Flood Control Act of December 22, 1944 (58 Stat. 887), and the Memorandum of Understanding between the Secretary of the Interior and Secretary of the Army as executed on February 24, 1975, between the UNITED STATES OF AMERICA, hereinafter called the United States, acting for this purpose through the officer executing this contract, hereinafter called the Contracting Officer, and the ANG COAL GASIFICATION COMPANY, with its principal place of business at Detroit, Michigan, hereinafter called the Contractor;

* * * *

ADMINISTRATIVE RECORD 302599-601

UNITED STATES DEPARTMENT
OF THE INTERIOR
WATER AND POWER RESOURCES SERVICE
Washington, D.C. 20240

In Reply Refer To: 440 [Nov. 5, 1980]
840.

Memorandum

To: Assistant Secretary—Land and Water Resources

From: Commissioner /s/ (Illegible)

Subject: Missouri River Basin Water Marketing Program

This is in response to the September 23, 1980, memorandum from Acting Assistant Secretary—Land and Water Resources Daniel P. Beard.

Because of the intradepartmental differences that have arisen from numerous circulations of the Secretarial Issue Document (SID), which was primarily developed to extend the term of the Memorandum of Understanding (MOU) among the Secretary of the Interior, the Secretary of the Army, and the Secretary of Energy, we believe no further effort should be expended to resolve the corollary issues of Indian involvement raised by the Bureau of Indian Affairs and the pricing of water raised by the Assistant Secretary—Policy, Budget, and Administration and the Office of the Inspector General. We believe arduous and conscientious efforts to resolve all of these differences have been made.

As you may recall, this was the second item to be included on Water and Power's Code 115 Tracking System initiated November 27, 1978, to resolve crucial priority issues. From the beginning, see page 1 of the SID,

Water and Power has identified and the Solicitor has agreed that, ". . . the Secretary of the Interior has full legal authority to market industrial water from the main-stem reservoirs. . . ." The MOU has been and still is considered to be a ". . . highly desirable administrative device . . ." to clarify the several Federal agency roles. This was accomplished with the MOU that was executed by Army and Interior in 1975, and the MOU was later expanded to include the Department of Energy when it was created in 1976. Although that document expired December 31, 1978, we intend to follow as our policy the principles that were then established, e.g.,

1. Water and Power will continue to process all applications for industrial water from the main-stem reservoirs and will coordinate such applications with the State or States involved;

2. The Secretary of the Interior will contract for water service up to 1 million acre-feet which has been determined to be available for interim industrial uses from that identified for future irrigation use. Such uses will not impair the irrigation efficiency of the project pursuant to section 9(c)(2) of the Reclamation Project Act of 1939 (53 Stat. 1187);

3. Advise the Secretary of the Army of all contracts prior to their execution so that the Corps of Engineers can retain its operational and managerial controls over the main-stem reservoirs;

4. Allow the Secretary of Energy to review all contracts prior to their execution to ensure that the proposed industrial water service represents a beneficial use that should take precedence over hydroelectric power generation; and

5. Interior shall coordinate the lead responsibility for all site-specific industrial undertakings to ensure compliance with the National Environmental Policy Act.

We believe the foregoing principles will allow Water and Power to move forward with any applications for new or amendatory contracts. As you will recall, existing procedures permitted the execution of the master water service contract with the State of Montana in 1976, and the site-specific water service contract with the Basin Electric Power Cooperative in 1978 and the ANG Coal Gasification Company in 1979.

We received an official request from the State of Montana on June 17, 1980, to extend its master water service contract which will expire September 30, 1981. This contract is being negotiated and a *Federal Register* notice announcing our intent to amend the contract was published on July 29, 1980. The Upper Missouri Region has received inquiries from the Dryer Brothers for its proposed Circle West Project, the WESCO, and the Basin Electric Power Cooperative. Since all of these demands involve water from Fort Peck Reservoir they are being coordinated with the State of Montana pursuant to its master water service contract.

We believe the principles identified above are reasonably well-established and understood by the Departments of Army and Energy, and the Governors of the 10 Missouri River Basin States. To the extent that Indian resources may be involved, we will handle such requests on a case-by-case basis.

The periodic review of water service contract rates at 5-year intervals will accommodate adjusting future rates based on the current cost of replacement power plus the return of assigned water supply (ultimately for irrigation) capital costs with interest, annual operation, maintainance, and replacement costs, and contract administration costs. The initial rate for any new contracts or amendments for industrial water service will be premised on the above concepts. Such procedure is in line with

subsection 9(c)(2) of the Reclamation Project Act of 1939, i.e., rates are to be set so that they ". . . will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper. . . ."

As recommended by the Assistant Secretary—Policy, Budget, and Administration, and in the event that demand for water exceeds the quantity set aside for interim, industrial and related uses, we will consider pricing the water at market value by competitive bidding or some other acceptable procedure.

We agree with the views of the Deputy Solicitor—Program Coordination that there is no legal authority to share surplus revenues with the State or Indian tribes as stated in his September 5, 1980, memorandum to the Executive Secretary. Thus, our policy under any subcontract will be that the subcontract rate can be no higher than the Federal rate given in the master contract unless the non-Federal administrative costs are greater.

In summary and with your concurrence, we intend to continue water marketing activities from the main-stem reservoirs on the basis that (1) further extension of the MOU is not needed, (2) follow the principles previously established in the MOU as identified above, (3) adopt the ratemaking procedure for all new and amendatory contracts that utilize the current cost of replacement power plus the return of assigned water supply (ultimately for irrigation) capital costs with interest, annual operation, maintenance, and replacement costs, and contract administration costs, and (4) follow the advice of the Deputy Solicitor—Program Coordination that there is no legal authority to share surplus revenues earned from the water service contracts.

Concur.

/s/ Illegible
Assistant Secretary
Land and Water Resources
and Returned

Nov. 12, 1980
Date

cc: Regional Director, Billings, Montana
Regional Director, Denver, Colorado
Associate Solicitor—Energy and Resources
Field Solicitor—Billings, Montana
Wyoming Reclamation Representative,
Cheyenne, Wyoming
Kansas Reclamation Representative,
Topeka, Kansas

ADMINISTRATIVE RECORD 500696

AGREEMENT
FOR
SOUTH DAKOTA CONSERVANCY DISTRICT TO
ASSIGN A WATER RIGHT TO
ENERGY INDUSTRY USE
TO
ETSI PIPELINE PROJECT

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PARTIES

THIS AGREEMENT made and entered into this 23rd day of December, 1981 (hereinafter referred to as the Effective Date) by and among ENERGY TRANSPORTATION SYSTEMS INC., a Delaware corporation, and ETSI PIPELINE PROJECT, a Joint Venture created as a partnership under the laws of Delaware, (said venture hereinafter referred to as "ETSI"), by and among ARCOAL TRANSPORTATION, INC., BECHTEL PETROLEUM, INC., LEHMAN REALTY CORPORATION, SLURCO CORPORATION, and TEXAS EASTERN SLURRY TRANSPORT COMPANY; the SOUTH DAKOTA CONSERVANCY DISTRICT (hereinafter referred to as "SDCD"); and the STATE OF SOUTH DAKOTA (hereafter referred to as "South Dakota").

WITNESSETH:

RECITALS

WHEREAS, prolonged and existing drought conditions in western South Dakota and water quality problems require the immediate provision of adequate and potable water supplies to communities and Rural Water Systems for human and animal consumption; and

WHEREAS, the unavailability of such water supplies endangers the economic viability of the agricultural industry in western South Dakota and the economy of South Dakota as a whole; and

WHEREAS, the continued use of existing water supplies containing radium, sulfates, iron, manganese, chlorides, fluorides and nitrates constitutes an immediate and chronic hazard to the health, safety and welfare of municipal and rural residents in the western portion of South Dakota; and

WHEREAS, South Dakota has recognized the water supply and quality problems of western South Dakota

communities and Rural Water Systems and has determined that such conditions may be alleviated or eliminated by supplying water from the Oahe Reservoir; and

WHEREAS, ETSI is willing to transport as additional consideration water owned by such communities and Rural Water Systems; and

WHEREAS, ETSI intends to construct one or more Aqueducts through western South Dakota for the transportation and beneficial use of Oahe Reservoir water into Wyoming or other states for Energy Industry Use in a quantity not to exceed fifty thousand (50,000) acre-feet per year; and

WHEREAS, ETSI also intends to construct the Coal Slurry Pipeline Project, which initially will appropriate and use approximately twenty thousand (20,000) acre-feet per year of said Oahe Reservoir Water for the transportation of coal from points in the State of Wyoming to various points in the United States, and ETSI also intends to complete the appropriation of approximately thirty thousand (30,000) acre-feet per year of Oahe Reservoir Water for a second Coal Slurry Pipeline or other Energy Industry Use; and

WHEREAS, the SDCD, pursuant to House Bill 1002, as enacted effective September 24, 1981, has filed an Application for Permit to Appropriate Water with the South Dakota Water Management Board for a permit to appropriate fifty thousand (50,000) acre-feet of Oahe Reservoir Water per year for Energy Industry Use, and intends to sell and assign such permit to ETSI for use within and outside South Dakota, and the SDCD and South Dakota deem such use of Oahe Reservoir Water by ETSI to be lawful; and

WHEREAS, Energy Transportation Systems Inc. has been granted the Wyoming Groundwater Permits to appropriate groundwater from the Madison Formation Aquifer, which ETSI and Energy Transportation Sys-

tems Inc. deem to be lawful and which South Dakota and the SDCD deem to be unlawful;

NOW, THEREFORE, for the consideration and upon the terms and conditions set forth herein, the parties do hereby mutually agree, as follows:

ARTICLE 1—DEFINITIONS

As used herein the following words and phrases shall mean:

Acre-foot. The volume of water that would cover one acre to a depth of one foot, equivalent to 43,560 cubic feet.

Alternate Water Source. Any source of water other than Oahe Reservoir water or water from the Madison Formation Aquifer as defined in this Agreement.

Application for Permit to Appropriate Water. Application for Permit to Appropriate Water within the State of South Dakota No. 1791-2 as filed by the SDCD with the Water Management Board.

Aqueduct. Any pipeline capable of transporting Oahe Reservoir Water.

Business Day. A calendar day other than a Saturday or Sunday or legal holiday under South Dakota law.

Coal Slurry Pipeline. Any pipeline capable of transporting coal slurry.

Coal Slurry Pipeline Project. The Coal Slurry Pipeline as described in the Final Environmental Impact Statement, Energy Transportation Systems Inc., issued by the United States Department of the Interior, Bureau of Land Management, July, 1981, as may be supplemented or amended.

Development Period. Ten (10) years from the date of this Agreement, being the period provided by SDCL Section 46-5-21, as amended.

Day or Date. Calendar day or date, unless otherwise specified. When used herein in connection with an order or other judicial or administrative action, the day of public filing of such order or other action, unless expressly provided otherwise.

Energy Industry Use. The use of water in an amount in excess of one thousand (1,000) acre-feet per year as a medium for carrying coal or other Energy Minerals, or in the extraction or refining of Energy Minerals.

Energy Industry User. A natural person, firm, partnership, association, syndicate, corporation, joint venture, public entity or state or federal agency using or supplying water for Energy Industry Use.

Energy Minerals. Any mineral fuel including, but not limited to, coal, lignite, petroleum, oil, natural gas, uranium and thorium and any combination of minerals used in the production of energy.

Fixed-Weighted Price Index for the Gross National Product. The fixed-weighted price index for the gross national product, as computed and published by the United States Department of Commerce in publication entitled "Survey of Current Business" or as published in any successor publication. The Fixed-Weighted Price Index for the Gross National Product is currently published in Table 7.1-7.2, and such index was 183.3 for 1980.

License Date. The first day a license is issued and delivered to ETSI pursuant to SDCL Section 46-5-30 for the Oahe Permit after completion of construction of physical works necessary to appropriate Oahe Reservoir Water for Energy Industry Use.

Madison Formation Aquifer. The Madison Formation Aquifer includes the Mississippian Age Madison Formation (commonly known as the Madison Formation, Pahasapa Formation, or Guernsey Formation)

and all hydraulically connected formations occurring between the top of the Precambrian basement rocks and the bottom of the Roundtop Shale (lower Minnelusa). The hydraulically connected formations included in this definition are the Madison Formation, Deadwood Sandstone, Red River Limestone, Fairbank or Bell Sand, and the Reclamation (lower Minnelusa) where they are present. The areal extent, for the purposes of this definition, shall be south of a line running east and west through the northern border of Powder River County, Montana, north of a line running east and west through the northern border of Platte County, Wyoming, and east of a line running north and south through the eastern border of Campbell County, Wyoming.

Oahe Permit. The permit issued to the SDCD by the Water Management Board as provided in ARTICLE 2 of this Agreement for the beneficial use of not more than fifty thousand (50,000) acre-feet of water per year to be used for a Coal Slurry Pipeline and other Energy Industry Use that is to be transported through the West River Aqueduct or any other Aqueduct constructed from Oahe Reservoir through South Dakota into Wyoming.

Oahe Reservoir Water. Water diverted pursuant to the Oahe Permit from that body of Missouri River water impounded by the Oahe Dam, Pick-Sloan Missouri River Basin Program, South Dakota.

Right of Way. Land, property or interest therein devoted to the West River Aqueduct.

Rural Water Systems. Those water distribution systems organized under SDCL Chapter 46-16, or defined by SDCL 10-36A-1 as in effect on the date of this Agreement and established to provide water for domestic and municipal uses.

Transfer Point. The pickup point immediately below the connection with the West River Aqueduct where the water diverted to a community or Rural Water System from said Aqueduct is measured and control is transferred to them.

Water Management Board. The State of South Dakota Water Management Board.

West River Aqueduct. A pipeline which is capable of transporting Oahe Reservoir Water through western South Dakota and into Wyoming.

Wyoming Groundwater Permits. Wyoming Permits to Appropriate Groundwater, Nos. U.W. 27854 through U.W. 27893, issued to Energy Transportation Systems, Inc.

ARTICLE 2—ISSUANCE, ASSIGNMENT AND DEFENSE OF THE OAHE PERMIT

A. *Issuance of Oahe Permit.* The SDCD shall be responsible for securing the issuance of the Oahe Permit from the Water Management Board.

B. *Assignment of Oahe Permit.* Within twenty (20) days after the Oahe Permit is issued, the SDCD shall sell and assign (in the form of Appendix A hereto) and deliver a copy of the Oahe Permit to ETSI for the term of this Agreement. Said assignment shall be without warranty or guarantee of any kind, express or implied, except the SDCD warrants that as of the time of the assignment it will not have theretofore assigned or encumbered said permit, and shall be subject to the terms, conditions and restrictions set forth in this Agreement.

C. *Defense of Oahe Permit.* The SDCD and South Dakota shall do those things reasonably within their power to perfect, protect, remedy and cure the Oahe Permit and its assignment to ETSI. After the Oahe Permit is assigned to ETSI, ETSI shall be jointly respon-

sible with the SDCD to defend the Oahe Permit, and the assignment thereof, in any proceedings against the SDCD or South Dakota or ETSI which may be brought before any court or administrative body contesting the validity of the Oahe Permit. The parties hereto agree that they shall cooperate with each other in any such litigation and that each shall have the right to intervene and defend the Oahe Permit and its assignment in any such proceedings.

ARTICLE 3—PAYMENTS

A. *Schedule of Payments.* In consideration of the rights and benefits afforded in this Agreement, ETSI shall pay to the SDCD the following amounts under the conditions stated below:

1. Two Million Dollars ($2,000,000) as provided under "a" or "b" below, whichever provision is applicable.

a. If the Oahe Permit is issued by the Water Management Board and the assignment of the Oahe Permit to ETSI is executed and delivered by the SDCD as provided in Paragraph B of ARTICLE 2, and the Oahe Permit and its assignment to ETSI are for fifty thousand (50,000) acre-feet of water per year and are free of all conditions or limitations other than those expressly provided for in this Agreement, then ETSI shall pay the SDCD Two Million ($2,000,000) upon the next Business Day following the execution and delivery of such assignment of the Oahe Permit by the SDCD; or

b. If the Oahe Permit is denied by the Water Management Board, or the SDCD does not execute the assignment of the Oahe Permit to ETSI as provided in Paragraph B of ARTICLE 2 within twenty (20) days after the issuance of the Oahe Permit to the SDCD, or the Oahe Permit or assignment are for less than fifty thou-

sand (50,000) acre-feet per year, or contain conditions or limitations in addition to those expressly provided for in this Agreement, then ETSI shall either pay the SDCD Two Million Dollars ($2,000,000) or cancel this Agreement by giving the SDCD notice of such cancellation within one of the following two time periods (i) prior to the expiration of the time in which the decision of the Water Management Board may be appealed, if the action of the Water Management Board is the reason for such cancellation; or (ii) within thirty (30) days after the issuance of the Oahe Permit to the SDCD, if the action of the SDCD is the reason for such cancellation.

In the event of cancellation by ETSI under this Paragraph A.1, the Oahe Permit shall revert to the SDCD and there shall be no other remedy for either party.

2. Unless this Agreement is cancelled as permitted hereby, an additional Two Million Dollars ($2,000,000) as provided under "a", "b" or "c" below, whichever provision is applicable.

a. If the issuance or assignment of the Oahe Permit is not appealed, then ETSI shall pay the SDCD Two Million Dollars ($2,000,000) by the fifth day following the expiration of the time for appeal of such issuance or assignment to a Circuit Court of South Dakota; or

b. If the issuance or assignment of the Oahe Permit is appealed to a Circuit Court of South Dakota, and no further appeal is taken from the Circuit Court decision on such appeal, then ETSI shall pay Two Million Dollars ($2,000,000) by the fifth day following the expiration of the time to appeal the decision of the Circuit Court to the South Dakota Supreme Court, unless ETSI has cancelled this Agree-

ment by giving the SDCD one of the following two notices:

(i) If no Circuit Court decision on such appeal is filed on or before March 31, 1982, then ETSI may give the SDCD notice of concellation no later than the date such a decision if filed; or

(ii) If, whenever such Circuit Court decision is filed, such decision invalidates or limits the Oahe Permit or its assignment to ETSI, then ETSI may give the SDCD notice of cancellation no later than five (5) days after the last date such decision may be appealed to the South Dakota Supreme Court.

c. If the Circuit Court decision on the issuance or assignment of the Oahe Permit is appealed to the South Dakota Supreme Court, then ETSI shall pay the SDCD Two Million Dollars ($2,000,000) on or before the fifth (5th) day following the date a decision by the South Dakota Supreme Court on such appeal is filed and becomes final, unless ETSI has cancelled this Agreement by giving the SDCD one of the following two notices:

(i) If no South Dakota Supreme Court decision on such appeal is filed and becomes final on or before October 1, 1982, then ETSI may give the SDCD notice of cancellation no later than the date such a decision is filed and becomes final; or

(ii) If, whenever such a South Dakota Supreme Court decision is filed and becomes final, such decision invalidates or limits the Oahe Permit or its assignment to ETSI, then ETSI may give the SDCD notice of

cancellation on or before the fifth (5th) day following the date such a decision is filed and becomes final.

In the event of cancellation by ETSI under this Paragraph A.2., the Oahe Permit shall revert to the SDCD, and ETSI's liability for payments shall be limited to any amount due the SDCD pursuant to Paragraph A.1. of this ARTICLE 3.

3. Unless this Agreement is cancelled as permitted hereby, an additional Three Million Dollars ($3,000,000) per year so that ETSI may pursue the appropriation of water for that year beginning on the first anniversary of the issuance of the Oahe Permit and continuing on each anniversary thereof, until such time as the payments described in Paragraph A.4. of this ARTICLE 3 are required to be commenced or the Development Period expires, whichever occurs first.

4. Unless this Agreement is cancelled as permitted hereby, Nine Million Dollars ($9,000,000) on the first field welding of the main coal slurry pipe of the Coal Slurry Pipeline Project. In addition, on each anniversary thereof so that ETSI may pursue the appropriation of water for that particular year, ETSI shall pay to the SDCD an amount adjusted according to the Fixed-Weighted Price Index for the Gross National Product according to the following formula: $A = 0.5\ B(1 + (C/D))$ where

A = amount of payment, provided that no payment shall ever be less than the immediately preceding payment.

B = Nine Million Dollars ($9,000,000) for the second payment under this Paragraph A.4., and thereafter the immediately preceding payment under this Paragraph A.4.

C = the Fixed-Weighted Price Index for the Gross National Product for the latest available calen-

dar year at the time of payment for which the Index has been published in the "Survey of Current Business" (or successor publication).

D = the Fixed-Weighted Price Index for the Gross National Product for the calendar year immediately preceding the calendar year applicable to "C", above.

In the event that the calculation of the Fixed-Weighted Price Index for the Gross National Product is altered or discontinued during the term of this Agreement, the parties agree to employ as a substitute that index published by any agency of the United States government which most closely reflects the assumptions, goals and methodology employed in the calculation of the Fixed-Weighted Price Index for the Gross National Product on the Effective Date of this Agreement. If the first payment under this Paragraph A.4. is made less than one year after the last payment under Paragraph A.3., there shall be credited against said first payment a prorata portion of said payment. If the Fixed-Weighted Price Index for the Gross National Product for a particular year is used in computing the amount of a payment and is then later revised by the United States Department of Commerce, no adjustment of that number shall be made as between the parties. Attached as Appendix B are sample calculations using the formula set out in this Paragraph A.4.

B. *Payment for Failure to Construct West River Aqueduct.* If, on or before July 1, 1984, for any reason whatsoever, including Force Majeure, ETSI has not constructed the West River Aqueduct so that communities and Rural Water Systems can have transportation of water, and ETSI has not, prior to that date, cancelled this Agreement pursuant to ARTICLE 3.A.1 or 3.A.2; or ARTICLE 11.C.4, then ETSI shall on July 1, 1984, pay to the SDCD the sum of One Million Five Hundred thousand Dollars ($1,500,000), which shall be the sole

remedy for such failure to construct and represents the amount agreed upon by the parties hereto as fair compensation for damages which are reasonably anticipated to be sustained by the SDCD and South Dakota as a consequence of such failure and not as a penalty.

C. *Late Payment.* In the event any amount payable by ETSI hereunder is not received by the SDCD on the date due, ETSI shall be liable for interest on such amount, from the date first due until the date received by the SDCD, at 125% of the prime rate charged by Citibank N.A. of South Dakota on ninety-day loans to their commercial borrowers of highest credit standing in effect on the date due. If the due date provided for herein shall fall on other than a Business Day, the due date shall be on the first Business Day following.

D. *Method of Payment.* All payments required of ETSI shall be made by certified or cashier's check and payable to the order of the SDCD. Payments shall be effective upon receipt of said check in the office of the Treasurer of the State of South Dakota. Alternatively, ETSI shall have the right to make payment by wire transfer or other mutually acceptable means.

E. *Failure to Pay.* The failure of ETSI to make any payment required by Paragraph A.2, A.3 or A.4 of this ARTICLE, after the passage of the ten (10) day period referred to in Paragraph G of ARTICLE 11, shall result in a cancellation of this Agreement. It will then be necessary for ETSI to determine whether the provisions of Paragraph B.1(a), (b) and (c) of ARTICLE 11, or the provisions of Paragraph E of ARTICLE 11 (provided that the Oahe Permit shall revert to the SDCD) shall be applicable to the cancellation. Such determination shall be made by the giving of notice by ETSI to the SDCD within fifteen (15) days after the end of said ten (10) day period, and a failure to give such notice shall be treated as if ETSI had given notice of cancellation under Paragraph B.1 of ARTICLE 11 on the last day of such period.

ARTICLE 4—MADISON FORMATION AQUIFER

A. *Wyoming Groundwater Permits.* Energy Transportation Systems Inc. has been issued the Wyoming Groundwater Permits to use and withdraw water from the Madison Formation Aquifer. By execution of this Agreement, ETSI and Energy Transportation Systems Inc. do not abandon said Wyoming Groundwater Permits, and the SDCD and the State of South Dakota do not recognize the validity of said permits. ETSI and Energy Transportation Systems Inc. represent that they have not been issued any other permits by the State of Wyoming to use or withdraw water from the Madison Formation Aquifer.

B. *Agreement Not to Use Madison Formation Aquifer.* ETSI and Energy Transportation Systems Inc. agree that so long as Oahe Reservoir Water is available to ETSI, they will not: (1) use or withdraw water from the Madison Formation Aquifer as provided in the Wyoming Groundwater Permits; nor (2) apply for or obtain any additional permits to use or appropriate water from the Madison Formation Aquifer; nor (3) sell, grant, assign, hypothecate, pledge or otherwise transfer any right, title or interest in the Wyoming Groundwater Permits other than for transfers between ETSI and Energy Transportation Systems Inc. None of the foregoing shall prohibit ETSI from doing work or testing necessary to comply with the due diligence requirements of Wyoming law as long as there is no impairment of pressure caused thereby in South Dakota ground water supplies. Oahe Reservoir Water shall be deemed to be available unless this Agreement has expired pursuant to ARTICLE 10, or has been cancelled or terminated pursuant to Paragraphs A.1. or A.2. of ARTICLE 3 or Paragraphs A, C, D or H of ARTICLE 11, or ARTICLE 12.

C. *Agreement Not to Litigate Wyoming Groundwater Permits.* Upon assignment of the Oahe Permit to ETSI

by the SDCD, and so long as ETSI and Energy Transportation Systems Inc. shall comply with the restrictions described in Paragraph B of this ARTICLE 4, the SDCD and South Dakota shall not seek any judicial or administrative relief, exercise any claim with respect to the Environmental Impact Statement (EIS) on the Coal Slurry Pipeline Project, or any other claim against ETSI or Energy Transportation Systems Inc. with respect to any proposed use of the Madison Formation Aquifer, pursuant to the Wyoming Groundwater Permits.

D. *No Prejudice Resulting from Agreements not to Use Madison Formation Aquifer or Litigate Wyoming Groundwater Permits.* If at any time Oahe Reservoir Water is not available to ETSI, as defined in Paragraph B of this ARTICLE 4, ETSI and Energy Transportation Systems Inc. shall be relieved of their obligations under said Paragraph B, and the SDCD and the State of South Dakota shall be relieved of their obligations under Paragraph C of this ARTICLE 4. In such event, none of the parties hereto shall be prejudiced in litigation, or otherwise, by having complied with their respective obligations set forth in this ARTICLE 4. In any litigation concerning the Madison Formation Aquifer, no party to this Agreement shall defend on the grounds or allege against any other party the claims of laches, delay, statute of limitations, estoppel, waiver or similar contentions, if any such defense or claim arises from compliance with the obligations of this Agreement. The rights of the parties under this Paragraph D shall survive any cancellation or termination of this Agreement.

ARTICLE 5—RIGHT OF WAY GRANTED

Energy Transportation Systems Inc. and ETSI agree that any transfer or assignment of the right of way grant issued to it for the Coal Slurry Pipeline Project by the United States Department of the Interior, Bureau of Land Management, shall be made expressly conditional

upon the acceptance by the transferee or assignee of the duties to be performed by ETSI or Energy Transportation Systems Inc. under this Agreement. ETSI and Energy Transportation Systems Inc. shall endeavor to cause notice thereof to be recorded in the proper federal office where the grant will be issued. ETSI and Energy Transportation Systems Inc. shall provide the SDCD with notice of any such transfer or assignment within ten (10) days thereof. This restriction shall not create any express or implied right of prior approval by the SDCD or South Dakota to such assignment or transfer.

ARTICLE 6—FEDERAL OAHE RESERVOIR PERMISSION

ETSI, at its sole cost and expense, shall be responsible for securing from the United States of America and its agencies any permission required for the storage, transportation or use of Oahe Reservoir Water, rights of way for construction of necessary facilities to divert the water and for construction of the West River Aqueduct, in accordance with this Agreement. The SDCD shall assist and cooperate with ETSI in securing such permission, and shall be entitled to participate in negotiations, hearings or other procedures required for securing said permission, including any relevant agency or court proceedings. ETSI shall provide the SDCD with timely notice of such negotiations, hearings and proceedings, and shall furnish the SDCD with copies of all legal or public filings in connection therewith.

ARTICLE 7—CONSTRUCTION AND FINANCING OF WEST RIVER AQUEDUCT

A. *Construction and Maintenance.* The West River Aqueduct shall be constructed, owned and operated by or for ETSI. The SDCD, South Dakota and ETSI shall cooperate with each other in connection with the construction of the West River Aqueduct. During construc-

tion ETSI shall maintain the right of way free of rubbish and excess materials, and shall restore any excavated surfaces, at its own cost and expense. ETSI shall provide the final plans and specifications for the West River Aqueduct to the SDCD for its information within thirty (30) days of their completion.

B. *Bond Financing.* ETSI shall have the right to finance the West River Aqueduct in any manner it sees fit. If requested by ETSI, SDCD shall use its best efforts, and do all things reasonably necessary to obtain tax-exempt financing agreeable to ETSI and the SDCD for constructing the West River Aqueduct, including, but not limited to, requesting an Internal Revenue Service ruling relating to the availability of such tax-exempt financing. ETSI shall pay all reasonable costs and expenses, including attorney's fees, necessary or incidental to obtaining any such tax-exempt financing which it has approved that are not paid out of bond proceeds. ETSI shall cooperate fully with the SDCD in securing such financing. Any failure to obtain a favorable Internal Revenue Service ruling or to secure tax-exempt financing shall not reduce, alter or otherwise affect any obligation of ETSI or Energy Transportation Systems Inc. under this Agreement.

C. *No South Dakota Indebtedness.* Any loan of the bond proceeds as provided in Paragraph B of this ARTICLE 7 shall be secured by such security as may be necessary to market the bonds. The bonds shall not constitute an indebtedness of South Dakota and shall not constitute nor give rise to a pecuniary or moral liability of South Dakota or charge against its general credit or taxing powers. No tax revenues of South Dakota, its people or any of its political subdivisions shall in any manner be obligated to pay for any portion of the construction or financing of the West River Aqueduct. Any bonds, indentures and related instruments shall be issued under terms and conditions mutually acceptable to the SDCD and ETSI.

ARTICLE 8—TRANSPORTATION OF WATER THROUGH WEST RIVER AQUEDUCT FOR COMMUNITIES AND RURAL WATER SYSTEMS

A. *Maximum Capacity.* In the absence of tax-exempt financing for the West River Aqueduct as provided in Paragraph B of ARTICLE 7, a maximum of four thousand three hundred (4,300) acre-feet of the total annual capacity of the West River Aqueduct shall be made available by ETSI for transportation of water without charge for local use by South Dakota communities and Rural Water Systems as provided for herein. If tax-exempt financing is used for the West River Aqueduct, the maximum capacity will be designated by those financing agreements, and such maximum shall be the minimum required in order to satisfy Internal Revenue Code requirements.

B. *Transportation.* Water owned by or provided by communities and Rural Water Systems shall be transported by ETSI from the point of diversion for Oahe Reservoir Water utilized by ETSI under the Oahe Permit through the West River Aqueduct. Any permits or licenses necessary for use of any water by South Dakota communities and Rural Water Systems shall be the sole responsibility of such South Dakota communities and Rural Water Systems, and ETSI shall have no obligation to provide any of the fifty thousand (50,000) acre-feet of Oahe Reservoir Water made available to it under the Oahe Permit to such communities and Rural Water Systems. The water shall be delivered at a total maximum rate for all Transfer Points combined of not more than six (6) cubic feet per second and at a design pressure for each Transfer Point of not more than forty (40) pounds per square inch absolute to a reasonable number of connections determined as follows:

1. On or before April 1, 1982, the SDCD shall develop and submit to ETSI in writing the size, loca-

tion and number of connections for Transfer Points from the West River Aqueduct to South Dakota communities and Rural Water Systems.

2. The information submitted by the SDCD shall be reviewed by ETSI, and if ETSI, in its best engineering judgment, determines that a connection for a Transfer Point as submitted by the SDCD will unreasonably impair the performance, or unreasonably increase the cost, of the connection of the operation and maintenance of the West River Aqueduct, ETSI shall have the option of relocating the connection, and ETSI shall be solely responsible for the direct additional costs to ETSI and the affected communities and Rural Water Systems caused by that relocation.

3. In order for ETSI to design its system in an orderly manner, the communities and Rural Water Systems whose water will be transported in the West River Aqueduct shall each enter into a standard written contract with ETSI consistent with this Agreement and setting forth the rights and obligations of the parties concerning the transportation of such water to such connection and the construction by the communities and Rural Water Systems of facilities necessary to use such water, *provided*, that if any such contract is not entered into by April 1, 1983, ETSI shall not be required to construct or transport water to any such Transfer Point. ETSI and the SDCD shall agree on the terms and conditions to be used in such contracts on or before August 1, 1982, and ETSI agrees thereafter to carry on good faith negotiations with the communities and Rural Water Systems.

C. *Unused Capacity.* Any portion of the total annual capacity of the West River Aqueduct set aside for use by communities and Rural Water Systems which is not utilized for the transportation of water from the

Oahe Reservoir to communities and Rural Water Systems as provided herein shall revert to ETSI. Any such reverted capacity shall again be made available to South Dakota communities and Rural Water Systems without transportation charge upon completion of any improvement of the West River Aqueduct resulting in increased capacity, or upon construction of any additional Aqueduct. In no event shall such reversion of capacity expand or enlarge ETSI's rights under the Oahe Permit.

D. *No Third Party Rights.* It is not intended hereby to create any third party beneficiary rights.

E. *Separate Operating Entity.* ETSI may create another entity to construct, own and/or operate the West River Aqueduct, and if it does so, the provisions hereof will also be assumed by said entity; *provided, however,* that the establishment of any such entity shall not reduce or relieve ETSI or Energy Transportation Systems Inc. of any of their obligations hereunder.

F. *ETSI's Rights and Responsibilities.* It is mutually acknowledged that the obligation of ETSI to transport water for the South Dakota communities and Rural Water Systems, as provided for herein, shall be subject to the following:

1. The water to be so transported shall be diverted from the Oahe Reservoir "as is" and ETSI shall have no duty to the SDCD, South Dakota, or to said communities or Rural Water Systems to upgrade the quality of the water. ETSI shall be entitled to mix corrosion inhibitors and drag reducers with said water, provided they will not impair the fitness for municipal use.

2. The quality of water transported by the West River Aqueduct will be the quality of water as same exists at the time first received by ETSI, with the normal and reasonable changes, if any, which will occur in the normal and ordinary transportation of

the water through a closed Aqueduct, under pressure, for the distance involved and subject to the last sentence of Paragraph F.1 above.

3. ETSI shall be responsible for all costs of construction, installation, operation and maintenance of connections at the Transfer Points for community and Rural Water Systems and for any and all related equipment and facilities, including valves and measuring devices. Community and Rural Water Systems water will be transported by ETSI, at ETSI's sole expense, to a measuring device at the Transfer Point, and the communities and Rural Water Systems will take custody of their water at the Transfer Point. ETSI shall cooperate in the physical connection of community and Rural Water Systems. The construction, installation, operation, maintenance and use of facilities and the treatment, storage, and distribution of community and Rural Water Systems water beyond the Transfer Point shall be the sole responsibility of the respective community and Rural Water Systems.

4. ETSI shall not be liable, either to the communities or Rural Water Systems, or to individual users, for interruption in the transportation of water resulting from causes not within ETSI's reasonable control. ETSI agrees to provide a policy of insurance in an amount of Five Million Dollars ($5,000,000) combined single limits, insuring liability for damage to property and/or injury to persons for each occurrence. In the event that ETSI has any liability hereunder for any failure to transport water as herein provided, whether sounding in contract or in tort, the total extent of ETSI's liability shall be limited to the proceeds collected under said insurance policy.

5. ETSI may close the West River Aqueduct, or segments thereof, for reasonable and necessary main-

tenance and repair without incurring any liability to communities or Rural Water Systems. Except in the case of emergency, reasonable advance notice of any intended closing of the West River Aqueduct, and of the anticipated length of such closing, will be given to the SDCD and all affected communities and Rural Water Systems. ETSI shall not be liable for closing the West River Aqueduct without such advance notice in the case of an emergency. In the event of an emergency requiring the closing of all or any part of the Aqueduct, ETSI shall provide notice of such closing to the SDCD and all affected communities and Rural Water Systems at the earliest practicable time, together with ETSI's best estimate as to the probable duration of such closing. In the event of any closing, ETSI shall promptly take appropriate action to restore the transportation of water through the West River Aqueduct at the earliest practicable time.

G. *Abandonment of the West River Aqueduct.* If at any time after construction of the West River Aqueduct by ETSI, ETSI determines to abandon operation of the West River Aqueduct for any reason, whether or not permissible under this Agreement, and including cancellation, termination or expiration of this Agreement, it is agreed that:

1. ETSI shall at the earliest practicable time provide the SDCD, South Dakota and all affected communities and Rural Water Systems with notice of said determination, specifying the effective date thereof; *provided, however*, that such notice shall in any event be given at least six (6) months prior to the date ETSI abandons operation of the West River Aqueduct. ETSI may withdraw said notice of abandonment at any time prior to the specified effective date thereof; *provided, further*, that ETSI may not thereafter abandon operation of the West River

Aqueduct without again providing notice in accordance with this Paragraph G.1.

2. ETSI shall continue to transport water to affected communities and Rural Water Systems for no less than six (6) months following the date of any notice given pursuant to Paragraph G.1 of this ARTICLE 8, regardless of whether ETSI is utilizing Oahe Reservoir Water for the Coal Slurry Pipeline Project or other Energy Industry Use.

3. Abandonment of operation of the West River Aqueduct shall be subject to the terms and conditions of this Agreement, and ETSI shall have no liability to the affected communities and Rural Water Systems by reason thereof.

4. If prior to the abandonment of operation of the West River Aqueduct, the SDCD and South Dakota cannot reach agreement with ETSI for purchase of the West River Aqueduct on mutually agreeable terms, the SDCD and/or South Dakota may exercise their rights of eminent domain to acquire the West River Aqueduct.

ARTICLE 9—DEVELOPMENT OF WATER RIGHT

A. *Use of Oahe Reservoir Water.* The parties understand that ETSI presently intends ultimately to complete construction of such facilities as are necessary to utilize beneficially up to fifty thousand (50,000) acre-feet per year of Oahe Reservoir Water in accordance with this Agreement within the Development Period. The parties agree that it may be necessary or desirable that such facilities be constructed in phases. ETSI presently intends and shall have the right to utilize approximately twenty-thousand (20,000) acre-feet per year of Oahe Reservoir Water transported through the West River Aqueduct for the Coal Slurry Pipeline Project. ETSI also presently intends and shall have the right within the

Development Period to use approximately thirty thousand (30,000) acre-feet of additional Oahe Reservoir Water transported through the West River Aqueduct or additional Aqueducts for a second Coal Slurry Pipeline or for other Energy Industry Use. The SDCD and South Dakota shall cooperate with ETSI in securing any approval necessary for such uses. No such use for other Energy Industry Uses shall be detrimental to South Dakota, the determination of which shall be governed by the standards set out in Paragraph 5 of ARTICLE 14. South Dakota has already approved the use of water under the Oahe Permit for the Coal Slurry Pipeline Project.

B. *Reversion of Unused Oahe Reservoir Water.* The right to appropriate that quantity of Oahe Reservoir Water not used by ETSI in the twelve consecutive months of greatest use during the Development Period shall revert, at the end of the Development Period, to South Dakota. Any such reversion shall not reduce, alter or otherwise affect any obligation of ETSI and Energy Transportation Systems Inc. under this Agreement. The sole remedy to the SDCD and South Dakota for ETSI's failure to utilize the full fifty thousand (50,000) acre-feet per year shall be the forfeiture by ETSI at the end of the Development Period of the right to any unused Oahe Reservoir Water.

ARTICLE 10—CONTRACT TERM

This Agreement shall be in effect from the Effective Date until fifty years from the License Date, unless otherwise terminated as provided herein. Upon expiration of this Agreement, all right, title and interest in the Oahe Permit shall revert to the SDCD, terminating any rights, privileges or duties of ETSI thereunder. This Agreement may be extended for such additional time as the parties hereto may agree in writing.

ARTICLE 11—CANCELLATION OR TERMINATION

A. *Cancellation or Termination by Consent of Parties.* This Agreement may be terminated or cancelled at any time upon the mutual agreement in writing of all parties hereto.

B. *Cancellation or Termination—Abandonment of Coal Slurry Pipeline.*

1. If at any time prior to the License Date, ETSI notifies the SDCD that it has abandoned all Coal Slurry Pipeline development for movement of Wyoming Coal, this Agreement shall terminate thirty (30) days after such notice. If prior to the License Date, ETSI ceases to exercise due diligence with respect to Coal Slurry Pipeline development, this Agreement shall be cancelled on the date that ETSI so ceases to exercise due diligence. For the purposes of this Paragraph B, it shall be conclusively presumed that ETSI has exercised due diligence during any calendar year that it has expended at least Five Million Dollars ($5,000,000) with respect to such development over and above any payments made to the SDCD under ARTICLE 3 of this Agreement. In the event of cancellation under this Paragraph B.1: (a) ETSI's liability for payments shall be limited to any amounts which have become due to the SDCD pursuant to ARTICLE 3 prior to the date of cancellation, plus any payments owing as provided in Paragraph B. of ARTICLE 3; (b) the Oahe Permit shall revert to SDCD; and (c) the prohibitions set forth in Paragraph B. of ARTICLE 4 pertaining to the Madison Formation Aquifer shall continue for fifty (50) years from the Effective Date of this Agreement.

2. If at any time on or after the License Date, ETSI abandons operation of all such Coal Slurry Pipelines, ETSI may cancel this Agreement on thirty

(30) days notice to the SDCD, and the requirements enumerated in Paragraph B.1. (a) through (c) of this ARTICLE 11 shall apply. If, notwithstanding such abandonment, ETSI does not so elect to cancel this Agreement, it may to the extent consistent with South Dakota law retain the Oahe Permit and continue to make the payments required under this Agreement. If for any reason the Oahe Permit is forfeited by ETSI under South Dakota law subsequent to said abandonment, the requirements of Paragraph B.1. (a) through (c) of this ARTICLE 11 shall apply.

C. *Cancellation—Use of Oahe Reservoir Water Prevented.* ETSI may cancel this Agreement by giving the SDCD notice of cancellation in the manner and for the reasons specified below:

1. If the United States of America or its agencies do not issue a decision on or before March 31, 1982, on any appropriate request by ETSI for federal permission required to utilize at least twenty thousand (20,000) acre-feet of Oahe Reservoir Water per year or required to obtain the necessary Federal Rights of Way for access to the Oahe Reservoir and construction of West River Aqueduct facilities on such Rights of Way, then ETSI may cancel by giving the SDCD notice of same. Any such notice shall be given no later than December 31, 1982, or the date of the decision on each respective request, which ever occurs first.

2. If the decision on any request specified in Paragraph C.1. of this ARTICLE 11 denies, invalidates or limits ETSI's ability to use at least twenty thousand (20,000) acre-feet per year of Oahe Reservoir Water, then ETSI may cancel by giving SDCD notice of same. Any such notice shall be given no later than December 31, 1982, or ten (10) days after the date of such decision, whichever occurs last.

3. If ETSI is unable, despite good faith efforts, to acquire the necessary South Dakota Right of Way for the West River Aqueduct, and, if there is pending or completed litigation involving the acquisition of the right of way which, if resolved unfavorably to ETSI would prevent ETSI's acquisition of the necessary right of way, then ETSI may cancel by giving the SDCD notice of same. Any such notice shall be given within ten (10) days after a decision of the South Dakota Supreme Court becomes final.

4. If at any time a final court or administrative order has been filed which invalidates the Oahe Permit or any federal approval described in Paragraph C of this ARTICLE 11, or which enjoins or specifically prohibits the use of Oahe Reservoir Water or South Dakota Rights of Way to the extent that at least twenty thousand (20,000) acre-feet per year of Oahe Reservoir Water cannot be used by ETSI for the Coal Slurry Pipeline Project, then ETSI may cancel by giving the SDCD notice of same. Any such notice shall be given no later than sixty (60) days after the date such order becomes final, meaning the last day on which such order may be directly reviewed or appealed to the next highest court or tribunal, whether by right or discretion, and such review has not been sought or such appeal taken.

In the event of cancellation under this Paragraph C: (a) ETSI's liability for payment shall be limited to any amounts which have become due to the SDCD pursuant to ARTICLE 3 prior to the date of cancellation, plus, if applicable, any payment as provided in Paragraph B of ARTICLE 3; and (b) the Oahe Permit shall revert to the SDCD.

D. *Cancellation Due to Pending Litigation.* If prior to the date of the first field welding of the main coal slurry pipe on the Coal Slurry Pipeline Project, any

court or administrative action other than direct appeals from original court or administrative actions described in ARTICLE 3 or Paragraph C of this ARTICLE 11 is pending which challenges the validity of the Oahe Permit or the ability to use Oahe Reservoir Water thereunder, ETSI may cancel this Agreement on thirty (30) days' notice to the SDCD, provided that:

1. Either ETSI, the SDCD, or South Dakota have brought on for hearing at the agency or trial court level, appropriate motions to dismiss, or for summary judgment or other summary disposition of such court or administrative action and such motions have been granted and appealed or have been denied, provided that if ETSI does not have standing to make such motions, and so informs the SDCD or South Dakota, the SDCD and South Dakota agree that if one or both do not make such motions in a timely manner, this condition specified in this Paragraph D.1 shall be deemed satisfied; and

2. ETSI reasonably concludes that such pending court or administrative action so jeopardizes its timetable and increases the cost of the Coal Slurry Pipeline Project that under the circumstances it is a prudent and reasonable decision to cancel this Agreement.

3. If the SDCD disagrees with ETSI that the condition in Paragraph D.2 has been satisfied and if litigation results, any such action shall be brought before and determined (subject to appeal) by the Circuit Court of Hughes County, South Dakota. If litigation is pending before the Circuit Court of Hughes County, South Dakota, and because thereof ETSI seeks to cancel under the terms of ARTICLE 11.D hereof (Cancellation Due to Pending Litigation) and thereafter there is litigation concerning such cancellation, it is mutually agreed that upon the request of either party, the parties hereto will

join in a motion to have said cancellation case assigned to a judge different from the judge to whom the said pending initial litigation was or is pending.

In the event ETSI elects to cancel this Agreement under this Paragraph D, then (a) ETSI's liability for payments owing shall be limited to any amounts which have become due to the SDCD pursuant to ARTICLE 3 prior to the date of cancellation, plus any payment as provided in Paragraph B of ARTICLE 3; and (b) the Oahe Permit shall revert to the SDCD.

E. *Cancellation—Alternate Water Source.* ETSI may cancel this Agreement at any time upon sixty (60) days notice to the SDCD that ETSI intends to use an Alternate Water Source for its Coal Slurry Pipeline Project, subject to the following:

1. The obligations and restrictions imposed upon ETSI and Energy Transportation Systems Inc. pursuant to Paragraph B of ARTICLE 4 shall survive any such cancellation and shall continue in full force and effect for fifty (50) years from the Effective Date of this Agreement;

2. In the event notice of such cancellation is provided by ETSI prior to the first use of Oahe Reservoir Water, ETSI's liability for payments in accordance with ARTICLE 3 shall be equal to the sum of:

a. Any amounts which have become due to the SDCD pursuant to ARTICLE 3 prior to the date of cancellation, plus

b. Any payment as provided in Paragraph B of ARTICLE 3, plus

c. Forty-Five Million Dollars ($45,000,000) *less* Nine Million Dollars ($9,000,000) times the number of payments previously paid by ETSI pursuant to Paragraph A.4. of ARTICLE 3 but not to exceed Forty-Five Million Dollars

($45,000,000) and to be paid without indexing in annual installments of Nine Million Dollars ($9,000,000) except for the last payment.

3. In the event notice of such cancellation is provided by ETSI subsequent to the first use of Oahe Reservoir Water, ETSI may elect to retain the Oahe Permit, in which event ETSI shall continue to be liable for annual payments to the SDCD in accordance with Paragraph A.4. of ARTICLE 3 for so long as ETSI shall continue to hold the Oahe Permit, or until the Oahe Permit is forfeited under South Dakota law. Should ETSI elect not to retain the Oahe Permit, the Oahe Permit shall revert to the SDCD, and ETSI's liability for payments in accordance with ARTICLE 3 shall be equal to the sum of:

a. Any amounts which have become due to the SDCD pursuant to ARTICLE 3 prior to the date of cancellation, plus

b. Any payment as provided in Paragraph B of ARTICLE 3, plus

c. Forty-Five Million Dollars ($45,000,000), *less* Nine Million Dollars ($9,000,000) times the number of payments previously paid by ETSI pursuant to Paragraph A.4. of ARTICLE 3 but not to exceed Forty-Five Million Dollars ($45,000,000) and to be paid without indexing in annual installments of Nine Million Dollars ($9,000,000) except for the last payment.

Nothing herein shall preclude ETSI from temporarily using an Alternate Water Source, but such temporary use shall not reduce, relieve or otherwise affect any obligation of ETSI or Energy Transportation Systems Inc. under this Agreement, nor will said temporary use result in a cancellation under this Paragraph E.

F. *General Right to Cancel.* ETSI may, in its discretion, cancel this Agreement at any time after it has

made the payments required under Paragraph A.1. and A.2. of ARTICLE 3, upon sixty (60) days notice to the SDCD. In the event of cancellation under this Paragraph F.: (a) ETSI's liability for payments shall be equal to the sum of:

(i) Any amounts which become due to the SDCD pursuant to ARTICLE 3 prior to the date of cancellation, plus

(ii) Any payment as provided in Paragraph B. of ARTICLE 3, plus

(iii) Forty-Five Million Dollars ($45,000,000), *less* Nine Million Dollars ($9,000,000) times the number of payments previously paid by ETSI pursuant to Paragraph A.4. of ARTICLE 3 but not to exceed Forty-Five Million Dollars ($45,000,000) and to be paid without indexing in annual installments of Nine Million Dollars ($9,000,000) except for the last payment.

(b) The Oahe Permit shall revert to SDCD; and (c) the prohibitions set forth in Paragraph B of ARTICLE 4 pertaining to the Madison Formation Aquifer shall continue for fifty (50) years from the Effective Date of this Agreement.

G. *Termination for Fault.* With the exception of default for failure to make payments provided for herein, if either party should default in the performance of any of the terms, conditions, or obligations assumed by them herein, then the other party shall first notify the defaulting party of the nature of such default, and thereafter the defaulting party shall have thirty (30) days to cure such default, or if such default is of such a nature that the same cannot reasonably be cured within thirty (30) days, the defaulting party shall have such additional time to cure as is reasonable under the circumstances and if such default is continuing thereafter the other party may pursue its remedies available for such default,

including, where applicable, voiding the transfer of the Oahe Permit or cancelling the Oahe Permit as provided in Section 4 of House Bill 1002 as enacted effective September 24, 1981. A party who fails to make a payment required in this Agreement shall have ten (10) days from the date of receipt of notice from the other party that such payment was due to cure such default, and if such default is continuing thereafter the other party may pursue its remedies available for such default.

H. *Cancellation—Oahe Permit.* If the Two Million Dollar ($2,000,000) payment becomes due and has been paid under the terms of Paragraph A.2 of ARTICLE 3, if ETSI by means of an independent certified audit establishes to the reasonable satisfaction of the SDCD, that ESTI has expended One Million Dollars ($1,000,000) after the Effective Date hereof in the development of the West River Aqueduct in right of way acquisition, engineering and other development costs, if ETSI is reasonably proceeding in good faith with its other obligations under this Agreement, and if despite such fact either party desires further substantiation of the quality and validity of the Oahe Permit and the ability of ETSI to legally use at least 20,000 acre-feet of water per year thereunder for the Coal Slurry Pipeline Project, then the parties shall work together to seek mutually acceptable remedial measures. If ETSI nevertheless determines on the basis of a written legal opinion in good faith that questions exist with respect to the quality and validity of the Oahe Permit and the ability to use water thereunder for the Coal Slurry Pipeline Project which are of such a serious nature as to materially jeopardize or impair financing or concluding transportation agreements with respect to the Coal Slurry Pipeline Project, then ETSI may cancel this Agreement by so notifying the SDCD not earlier than sixty (60) days nor later than one hundred twenty (120) days after the date of said payment. In the event of such cancellation: (a) ETSI's liability for payments shall be limited to any payments

which have become due to the SDCD pursuant to ARTICLE 3 prior to the date of cancellation, plus any payment as provided in Paragraph B of ARTICLE 3; and (b) the Oahe Permit shall revert to the SDCD.

ARTICLE 12—FORCE MAJEURE

Neither South Dakota nor the SDCD will be liable for damages nor be considered to be in default if performance of any obligation imposed on them by this Agreement cannot be performed because of Force Majeure as herein defined. Neither ETSI nor Energy Transportation Systems Inc. will be liable for damages nor be considered to be in default if performance of any obligation imposed on them by this Agreement cannot be performed because of Force Majeure; provided, however, that ETSI and Energy Transportation Systems Inc. shall exercise due diligence to remove such inability, and if they fail to do so, they shall be liable for damages resulting because of any such unreasonable delay. Force Majeure as used herein means such natural causes as failure of the Oahe Dam, failure of the West River Aqueduct because of earthquakes, slides or other casualties, or war, or valid legislative or other restraint of government such as a congressional prohibition against interstate movement of water or interbasin transfer of water. In addition, if ETSI's ability to use Oahe Reservoir Water is interrupted or impaired due to Force Majeure relating to the Oahe Reservoir or the West River Aqueduct for a period in excess of 120 days, ETSI may cancel this Agreement. In the event of cancellation under this ARTICLE 12: (a) ETSI's liability for payments shall be limited to any amounts which become due to the SDCD pursuant to ARTICLE 3 prior to the date of cancellation, plus any payment as provided in Paragraph B. of ARTICLE 3; and (b) the Oahe Permit shall revert to the SDCD.

ARTICLE 13—LEGAL RELATIONSHIPS AND RESPONSIBILITY TO PUBLIC

A. *Permits, Licenses and Taxes.* Except as otherwise provided in this Agreement ETSI shall procure all permits and licenses, obtain any and all necessary safety waivers, pay all charges, fees and taxes, and give all notices necessary and incidental to the due and lawful prosecution of this Agreement and ETSI shall defend, indemnify and hold harmless the SDCD and South Dakota and their representatives from any liability resulting from ETSI's failure to do so. Any interest, penalties, or other liabilities arising from such failure shall be solely for ETSI's account.

B. *Liability of ETSI.* ETSI shall indemnify, hold harmless, and protect the SDCD and South Dakota, their representatives, officers, employees, successors, and assigns, from all suits, actions or claims of any character brought because of any injuries or damage, personal or otherwise, received or sustained by any person, persons or property, including South Dakota-owned property, on account of any negligent act, omission or misconduct of ETSI, its representatives, officers, employees or agents; or because of any claims or amounts recovered from any infringements of patent, trademark or copyright, or from any claims or amounts arising or recovered under any "Workmen's Compensation Act", unemployment compensation statute, or comparable law; or from any claim or liability arising from or based on the violation of any other law, regulation, injunction, ordinance, order or decree; or from any liens or claims for which the SDCD or South Dakota might be or become liable, or to which SDCD or South Dakota property might be or become subject, which are chargeable to ETSI or any of its contractors, subcontractors, representatives, officers, employees or agents. This Agreement shall not be construed as a waiver of governmental immunity nor to create a new cause of action in any third parties.

C. *Liability of Public Officials, the SDCD and South Dakota.*

1. In carrying out any of the provisions of this Agreement, or in exercising any power or authority granted to them by or within the scope of the Agreement, there shall be no liability of any employees of the SDCD or South Dakota, or their authorized representatives, either personally or as officials of South Dakota, it being understood that in all such matters they act solely as agents and representatives of SDCD and/or South Dakota.

2. In the event of any occurrence for which ETSI has a specific right hereunder to terminate or cancel this Agreement, such termination or cancellation shall be ETSI's sole remedy for such occurrence, whether or not exercised, and such occurrence shall not give rise to any claim for damages against, or other liability on the part of, the SDCD or South Dakota. It is understood that in the event the SDCD or South Dakota breach this Agreement, under no circumstances whatsoever shall the SDCD or South Dakota be liable to ETSI or Energy Transportation Systems Inc. or any other party for damages, including lost profits or for any costs incurred in securing any replacement or substitute for Oahe Reservoir Water.

D. *Amendment.* No term or provision of this Agreement may be changed, waived, discharged or terminated, except by an instrument in writing signed by the party against which the enforcement of the change, waiver, discharge or termination is sought.

ARTICLE 14—ASSIGNMENT; SALE OF OAHE RESERVOIR WATER

ETSI shall have the unrestricted right to assign, sell or transfer this Agreement and the Oahe Permit and the unrestricted right to sell all or any part of its appropriated Oahe Reservoir Water pursuant to the Oahe Permit, subject to the following:

1. Any such assignee or transferee of this Agreement and the Oahe Permit shall be subject to all terms and conditions of this Agreement and the Oahe Permit and all purchasers shall use purchased water only in ways consistent with this Agreement and with the Oahe Permit as it is approved or is hereafter legally amended.

2. Any assignment, sale or transfer of this Agreement and the Oahe Permit, or any interest therein, or sale of Oahe Reservoir water shall not release ETSI or Energy Transportation Systems Inc. from any of their obligations under this Agreement.

3. If this Agreement and the Oahe Permit or any interest therein are assigned, sold or transferred, the assignee, purchaser or transferee must, as a condition to accepting such interest, agree in writing that it shall not make a new or increased use of water from the Madison Formation Aquifer for the same project for which it uses Oahe Reservoir Water for so long as it holds such interest; *provided, however,* that if the assignee, purchaser or transferee is using water from the Madison Formation Aquifer on the Effective Date of this Agreement, such use shall not be considered a violation of this provision.

4. If Oahe Reservoir Water is sold or transferred, the purchaser or transferee shall agree in writing that, unless it obtains the written consent of the SDCD, it shall not initiate any new use of water from the Madison Formation Aquifer for the same project for which it is using Oahe Reservoir Water for so long as it continues to use Oahe Reservoir Water for that project.

5. If on the date of a contract for the sale of Oahe Reservoir Water for Energy Industry Use by projects to be located in a state contiguous to South Dakota, South Dakota has in effect environmental

quality laws, as described below, which are more stringent than the otherwise applicable state or federal law, the purchaser shall agree to comply with said South Dakota environmental quality laws which set: (1) Air pollution emission standards for sulfur dioxide and designated hazardous air pollutants; and (2) water pollution standards for point-source discharges if the receiving waters flow into South Dakota.

ARTICLE 15—GOVERNING LAW AND SELECTION OF FORUM

This Agreement shall be governed in all respects by the law of South Dakota.

ARTICLE 16—SECURITY FOR PAYMENT

In the event ETSI cancels this Agreement pursuant to Paragraph E or F of ARTICLE 11, ETSI shall on the date of notice to the SDCD deliver to the SDCD an appropriate letter of credit, or other guarantee satisfactory to the SDCD, for the purpose of securing payment of all amounts then owed to the SDCD.

Should the SDCD require delivery of a letter of credit, after ETSI has made payments pursuant to Paragraph E or F of ARTICLE 11, the SDCD shall promptly give notice satisfactory to the issuing bank of reductions in the maximum amount secured.

The SDCD shall cancel the letter of credit and return the same to the issuing bank if:

1. The SDCD determines, upon the request of ETSI, that ETSI has sufficient assets to assure that payments which may be required under this Agreement can be paid and the SDCD approves cancellation of the letter of credit, said approval shall not be unreasonably witheld; or

2. ETSI has made all payments pursuant to Paragraphs E. or F. of ARTICLE 11; or

3. The letter of credit has expired on its own terms. Notices of reduction or cancellation shall also be given to ETSI.

Should the issuing bank become insolvent or breach any of the terms of said letter of credit, ETSI shall have thirty (30) days from the knowledge of such insolvency or breach to tender a substitute letter of credit or be in breach of this Agreement.

ARTICLE 17—REPRESENTATIONS AND WARRANTIES

A. *ETSI.* ETSI represents and warrants as of the effective date of this Agreement the following:

1. ETSI is a joint venture duly organized under the laws of the State of Delaware, and the joint venture partners will undertake to become duly qualified to do business in the State of South Dakota.

2. Energy Transportation Systems Inc. is a corporation duly organized and in good standing under the laws of the State of Delaware and will undertake to become duly qualified to do business in the State of South Dakota.

3. ETSI and Energy Transportation Systems Inc. have full power and authority to enter into this Agreement and to carry out the functions which they shall have undertaken in this Agreement.

4. All proceedings required to be taken by or on the part of ETSI and Energy Transportation Systems Inc. to enter into this Agreement have been duly taken. The execution of this Agreement by ETSI or Energy Transportation Systems Inc. will not violate any existing order, to wit, injunction or

decree of any court, administrative agency or governmental body.

B. *The SDCD and South Dakota.* The SDCD and South Dakota represent and warrant that all proceedings required to be taken by them have been taken to invoke their authority to enter into this Agreement and that the execution of this Agreement by the SDCD or South Dakota will not violate any existing order, writ, injunction or decree of any court, administrative agency or governmental body.

ARTICLE 18—NOTICES

All notices or other communications hereunder shall be in writing and any notice which invokes a right specifically afforded under this Agreement, including cancellation, termination or abandonment, shall specify the provision of this Agreement under which such notice is given and the grounds therefor. Notices shall be deemed duly given if delivered in person, telex, or by certified or registered mail, return receipt requested, first-class, postage prepaid to the person specified herein as entitled to receive such notice, or to their duly authorized representative, unless notice of a change of address is given pursuant to the provisions of this ARTICLE.

For the SDCD:
Secretary of the Department of Water and Natural Resources
Joe Foss Building
Pierre, South Dakota 57501

For South Dakota:
The Governor of the State of South Dakota
State Capitol Building
Pierre, South Dakota 57501

For ETSI:
President
ETSI Pipeline Project
P.O. Box 7598
San Francisco, CA 94120

For Energy Transportation Systems Inc.:	President Energy Transportation Systems Inc. P.O. Box 7598 San Francisco, CA 94120

The date of any such notice shall be the date of receipted as prescribed by this ARTICLE.

ARTICLE 19—INTERPRETATION

A. *References to Articles.* All references to articles, sections, or paragraphs, include all subarticles, subsections or subparagraphs under the article, section or paragraph reference.

B. *Referenced Standards.* All references specified by the number, symbol, or title of a reference standard shall comply with the latest edition or revision thereof and all amendments and supplements thereto.

C. *Effect of Headings.* The headings and titles to provisions contained herein are for convenience only, and shall not be deemed to modify or affect the rights and duties of parties to this Agreement.

D. *Joint and Several Liability.* The partners comprising the ETSI joint venture shall be jointly and severally liable for all obligations of ETSI under this Agreement.

E. *Entire Agreement.* This Agreement and the appendices attached hereto represent the entire agreement between the parties, and all previous communications, understandings, or agreements between the parties are hereby abrogated.

F. *Time of the Essence.* Time is of the essence in this Agreement, and any notices required hereunder, including notices of cancellation or termination, must be given within the times set forth in this Agreement, failing which the rights to be exercised pursuant to such notice shall be waived.

G. *Binding on Successors and Assigns.* This Agreement shall be binding upon and inure to the benefit of the parties hereto, their assigns and successors in interest.

ARTICLE 20—EXCLUSIVE REMEDY AND FORUM FOR MADISON LITIGATION

Wherever remedies or consequences for a particular breach or default are specifically provided under this Agreement, they shall be the sole and exclusive remedy or consequence available for such breach or default. It is mutually agreed that any action brought by the SDCD and/or South Dakota relating to a violation of the covenants and limitations on the use or withdrawal of water from the Madison Formation Aquifer shall be brought before and determined (subject to appeal) by the Circuit Court of Hughes County, South Dakota.

ARTICLE 21—NO THIRD PARTY BENEFICIARY RIGHTS

It is not intended hereby to create any third party beneficiary rights and only those who are parties to this AGREEMENT may maintain an action thereon.

ARTICLE 22—ATTORNEY FEES AND COSTS

In the event either party brings an action based on this contract, the prevailing party shall be reimbursed by the other party for all reasonable attorney's fees and expenses and court costs. If attorney's fees cannot be legally assessed against the SDCD or South Dakota, the amount of such fees fixed by agreement of the parties or by the court may be deducted by ETSI from its next payment hereunder. In any such action brought against the SDCD or South Dakota, ETSI shall provide notice of same to the Governor, Attorney General and Secretary of State of South Dakota.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and attested by

their duly authorized officers as of the date and year first above written.

SOUTH DAKOTA CONSERVANCY DISTRICT

By /s/ Robert L. Helmer
ROBERT L. HELMER
Chairman

ETSI PIPELINE PROJECT, A JOINT VENTURE

BY ARCOAL TRANSPORTATION, INC.

By /s/ H. E. Bond
President

THE STATE OF SOUTH DAKOTA

By /s/ William Janklow
WILLIAM JANKLOW
Governor

BY BECHTEL PETROLEUM INC.

By /s/ Illegible
Vice-President

BY LEHMAN REALTY CORPORATION

By /s/ Illegible
Vice-President

BY SLURCO CORPORATION

By /s/ Illegible

BY TEXAS EASTERN SLURRY
TRANSPORT COMPANY

By /s/ Illegible

ENERGY TRANSPORTATION
SYSTEMS, INC.

By /s/ Illegible
Attorney-in-fact

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF PENNINGTON)

On this the 23rd day of December, 1981, before me, the undersigned officer, personally appeared, ROBERT L. HELMER, who acknowledged himself to be the Chairman, of the Board of SOUTH DAKOTA CONSERVANCY DISTRICT, and that he, as such Chairman, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the SOUTH DAKOTA CONSERVANCY DISTRICT by himself as Chairman.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

/s/ James S. Nelson
JAMES S. NELSON
Notary Public
South Dakota

My Commission Expires: 4-7-83
(SEAL)

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF PENNINGTON)

On this the 23rd day of December, 1981, before me, the undersigned officer, personally appeared, WILLIAM JANKLOW, who acknowledged himself to be the Governor of the STATE OF SOUTH DAKOTA, and that he, as such Governor, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the STATE OF SOUTH DAKOTA by himself as Governor.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

/s/ James S. Nelson
JAMES S. NELSON
Notary Public
South Dakota

My Commission Expires: 4-7-83
(SEAL)

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF PENNINGTON)

On this the 23rd day of December, 1981, before me, the undersigned officer, personally appeared, ———— ————, who acknowledged himself to be the ———— of ARCOAL TRANSPORTATION. INC., a corporation, and that he, as such ————, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as ————.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

/s/ James S. Nelson
JAMES S. NELSON
Notary Public
South Dakota

My Commission Expires: 4-7-83
(SEAL)

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF PENNINGTON)

On this the 23rd day of December, 1981, before me, the undersigned officer, personally appeared, ————— ————, who acknowledged himself to be the ———— of BECHTEL PETROLEUM, INC., a corporation, and that he, as such ————, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as ————.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

/s/ James S. Nelson
JAMES S. NELSON
Notary Public
South Dakota

My Commission Expires: 4-7-83
(SEAL)

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF PENNINGTON)

On this the 23rd day of December, 1981, before me, the undersigned officer, personally appeared, ————— ————, who acknowledged himself to be the ———— of LEHMAN REALTY CORPORATION, a corporation, and that he, as such ————, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as ————.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

/s/ James S. Nelson
JAMES S. NELSON
Notary Public
South Dakota

My Commission Expires: 4-7-83
(SEAL)

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF PENNINGTON)

On this the 23rd day of December, 1981, before me, the undersigned officer, personally appeared, ————— ————, who acknowledged himself to be the ———— of SLURCO CORPORATION, a corporation, and that he, as such ————, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as ————.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

/s/ James S. Nelson
JAMES S. NELSON
Notary Public
South Dakota

My Commission Expires: 4-7-83
(SEAL)

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF PENNINGTON)

On this the 23rd day of December, 1981, before me, the undersigned officer, personally appeared, ————————, who acknowledged himself to be the ———————— of TEXAS EASTERN SLURRY TRANSPORT COMPANY, a corporation, and that he, as such ————————, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as ————————.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

/s/ James S. Nelson
JAMES S. NELSON
Notary Public, South Dakota

My Commission Expires: 4-7-83
[SEAL]

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF PENNINGTON)

On this the 23rd day of December, 1981, before me, the undersigned officer, personally appeared, ————————, who acknowledged himself to be the ———————— of ENERGY TRANSPORTATION SYSTEMS INC., a corporation, and that he, as such ————————, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as ————————.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

/s/ James S. Nelson
JAMES S. NELSON
Notary Public, South Dakota

My Commission Expires: 4-7-83
[SEAL]

APPENDIX A

FORM OF ASSIGNMENT AGREEMENT

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF _____)

KNOW ALL MEN BY THESE PRESENTS,

That, the SOUTH DAKOTA CONSERVANCY DISTRICT, a political subdivision of the State of South Dakota, in accordance with and subject to the terms and conditions of the Agreement by and among it, the STATE OF SOUTH DAKOTA, ENERGY TRANSPORTATION SYSTEMS, INC., and the ETSI PIPELINE PROJECT, a Joint Venture created as a partnership under the laws of Delaware by and among ARCOAL TRANSPORTATION, INC., BECHTEL PETROLEUM, INC., LEHMAN REALTY CORPORATION, SLURCO CORPORATION and TEXAS EASTERN SLURRY TRANSPORT COMPANY, executed the 23rd day of December, 1981, and for the considerations recited therein, does hereby grant, convey, sell, assign, transfer and set over unto the ETSI PIPELINE PROJECT, its right, title and interest under the permit issued to it by the South Dakota Water Management Board subject, to said Agreement, dated the 23rd day of December, 1981, to appropriate fifty thousand (50,000) acre-feet per year of Oahe Reservoir Water, a copy of said permit being attached hereto and incorporated herein by this reference. The SOUTH DAKOTA CONSERVANCY DISTRICT warrants that it has not heretofore assigned or encumbered said permit.

TO HAVE AND TO HOLD the same, to the ETSI PIPELINE PROJECT, and the ETSI PIPELINE PROJECT does hereby assume all obligations imposed under or in connection therewith.

IN WITNESS WHEREOF, the SOUTH DAKOTA CONSERVANCY DISTRICT has caused this assignment to be executed this — day of ————, 19—.

SOUTH DAKOTA CONSERVANCY DISTRICT

By ————————————

Robert L. Helmer, Chairman
Board of South Dakota
Conservancy District

Acceptance:

ETSI PIPELINE PROJECT

By ————————————,
(Title)

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF ————)

On this the — day of ————, 198—, before me, the undersigned officer, personally appeared, ROBERT L. HELMER, who acknowledged himself to be the Chairman, of the Board of SOUTH DAKOTA CONSERVANCY DISTRICT, and that he, as such Chairman, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the SOUTH DAKOTA CONSERVANCY DISTRICT by himself as Chairman.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

————————————

Notary Public, South Dakota

My Commission Expires:
[SEAL]

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF ————)

On this the — day of ————, 198—, before me, the undersigned officer, personally appeared, ————, who acknowledged himself to be the ———— of ETSI PIPELINE PROJECT, and that he, as such ———, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of ETSI PIPELINE PROJECT by himself as ————.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

————————————

Notary Public, South Dakota

My Commission Expires:
[SEAL]

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
Washington, D.C. 20314

DAEN-CWP

Regulation
No. 1105-2-20 29 January 1982

Planning

PROJECT PURPOSE PLANNING GUIDANCE

* * * *

(6) *Water Rights.* Water rights necessary for the use of the stored water will not be acquired by the Corps but will be obtained as necessary by the water users. The Corps should not become involved in resolving conflicts among water users over the right to use stored water for water supply purposes, but will look to responsible state agencies to resolve such conflicts. Where more than one user is involved in the same project, it is desirable that arrangements be made with a single agency, if practicable, for payment and use of the entire water supply storage. Possible encroachment of the operation of water supply storage on the lawful water uses in the downstream areas will be carefully considered and fully coordinated with the responsible local interests as well as with the state agency responsible for the administration of water rights and water laws.

b. *Irrigation.* Storage of water of irrigation of agricultural lands, whether to meet the entire needs or to supplement natural supplies, may be considered in plan formulation.

(1) *Western States.* Section 8 of the Flood Control Act of 1944 provides that Corps lakes may include irrigation as a project purpose upon the recommendation of the Secretary of the Interior in conformity with reclamation law. Section 8 also provides that the Secretary of the Interior may provide needed irrigation works to

make use of irrigation storage. It is the Department of Interior's responsibility to construct, operate, and maintain the additional works needed to utilize irrigation storage. Section 8 applies only in the 17 Western States to which the reclamation law applies. When the project costs allocated to irrigation exceed the estimated amount that can be repaid to the United States by the water users, in accordance with reclamation law, the amount of the excess will be stated and appropriate reference made to the fact that special authorization by Congress is required for Federal projects in which the irrigation costs exceed the water-users' repayment ability.

(2) *Areas Outside the Western States.* The Corps may include irrigation storage in reservoirs in areas outside the 17 Western States provided the non-Federal entity assumes one-half of the costs of the reservoir capacity allocated to irrigation. This policy is analogous to the established Corps policy for reclamation by drainage. It is identical to the position adopted by the Department of Agriculture for reservoir capacity allocable to irrigation.

7-3. *Special Considerations Applicable to Water Supply.*

a. *Permanent Rights to Storage.* Under the authority of Public Law 88-140, local interests acquire a permanent right to the use of storage for which they have completed payments under an agreement with the government, as long as the space is physically available, taking into consideration equitable reallocations as necessitated by sedimentation. They must also agree to continue to pay their share of annual operation and maintenance (O&M) costs allocated to the water supply storage, together with their share of the costs allocated to any necessary reconstruction, rehabilitation, or replacement of any features which may be required to operate the project.

b. *Modification of Completed Projects.* Reallocation of reservoir storage that would have a significant effect

on other authorized purposes or that would involve major structural or operational changes requires Congressional approval. Providing the above criteria are not violated, 15 percent of total storage capacity allocated to all authorized project purposes or 50,000 acre feet, whichever is less, may be allocated from the storage serving authorized purposes to storage serving municipal or industrial water supply at the discretion of the Commander, USACE. The cost allocated to the local interests will be established as the highest of the benefits or revenues foregone, replacement cost, or the updated cost of storage in the Federal project.

(1) *Repayment Provisions.* The interest rate applicable to repayment contracts should be that computed in accordance with the Water Supply Act of 1958 for the fiscal year in which the contract is approved. Since requests for reallocation of storage should be within the context of satisfying immediate needs, the 10-year interest free period is not considered appropriate. The repayment period should be limited to the remaining physical life of the project, but not to exceed 50 years.

(2) *Cost Accounts.* All income and expenses (investment, operation, maintenance, and replacement) associated with the water supply function shall be separately identified in the official cost account record. When there is a loss of revenue of existing purposes, or additional operation and/or maintenance expense to existing purposes are incurred because of the new water supply addition, such charges shall be shown as a direct charge against the water supply function. This will effect the appropriate cost reductions in the existing project purposes and all revenues from the new addition will be credited to the new purpose. If hydropower revenues are being reduced as a result of the reallocation, excess water supply revenues should be credited as hydropower income.

c. *Surplus Water.* The term surplus water means water trapped or stored in a reservoir project which is

not utilized to fulfill an authorized project purpose. If surplus water is available in Corps projects, then by definition, there will be no benefits or revenues foregone nor will there by any value assigned to replacement storage. Therefore, under the authority provided by Section 6 of the Flood Control Act of 1944, the desired quantity of water should first be converted to an equivalent storage requirement. The annual cost of this storage to include operation, maintenance, and replacement payments should then be established in accordance with paragraph b above. Non-Federal interests would then be required to make annual payments of this amount for the right to withdraw the specified quantity of water.

ADMINISTRATIVE RECORD 930314

DA Permit
No. SD 2SB OXT 3 004234
ETSI Pipeline Project
Intake Structure
Missouri River Mile 1081.50R
(Lake Oahe)

FINDINGS OF FACT

* * * *

I. Any water-marketing agreements entered into between the Government and ETSI would be separate and distinct from the issuance of permits to ETSI to place an intake structure in the Oahe Reservoir. Consequently, questions relating to the authority of the Government to enter into such agreements are not properly a part of my public interest review of this permit application and are beyond the scope of that review.

* * * *

/s/ V. D. Stipo
V. D. STIPO
Colonel, Corps of Engineers
District Engineer

10 June 1982
Date

ADMINISTRATIVE RECORD 500929

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF RECLAMATION
Washington, D.C. 20240

IN REPLY
REFER TO: 440
840.

Jun. 22, 1982

Memorandum

To: Secretary of the Interior

From: Commissioner

Subject: Proposed Water Service Contract with the ETSI Pipeline Project, A Joint Venture for Use of 20,000 Acre-Feet of Lake Oahe Water Annually in a Coal Slurry Project—Pick-Sloan Missouri Basin Program, South Dakota

1. *Introduction*: Attached for your consideration and approval as to form is the proposed water service contract for 20,000 acre-feet of water service with the ETSI Pipeline Project, A Joint Venture (ETSI). ETSI's plan involves pumping water from Lake Oahe in South Dakota and transporting it by pipeline to a point near Gillette, Wyoming, mixing the water with coal mined in the Gillette area, and then transporting the slurry by pipeline to the middle Southern States for use in coal-fired, steam-electric generating facilities. The proposed contract has been prepared pursuant to Reclamation law, particularly section 9(c)(2) of the Reclamation Project Act of 1939 (53 Stat. 1187), and the Flood Control Act of 1944 (58 Stat. 887). Also attached are a copy of the Record of Decision signed by the Regional Director, Billings, Montana, and a fact sheet setting forth pertinent information concerning the proposed contract.

2. *Environmental Considerations and Public Participation*: Because ETSI's proposed coal slurry pipeline project involves crossing access on some 36 sections of federally owned lands in Wyoming, the Bureau of Land Management (BLM), was designated as the lead Federal agency for National Environmental Policy Act (NEPA) compliance. BLM completed its final environmental statement (FES 81-26) in July of 1981. A public comment period of 60 days was allowed and on January 14, 1982, BLM determined that NEPA compliance was complete and approved the ETSI project.

FES 81-26 was prepared based on the use of ground water from the Madison Formation as the primary water supply for the project. Water from Lake Oahe was identified as an alternate supply. Because of the potential impact (drawdown) on ground water from the Madison Formation and the opposition to the use of that water, ETSI selected Lake Oahe as its preferred water supply. The Bureau of Reclamation adopted BLM's FES 81-26 as an adequate site-specific environmental evaluation for the proposed water service contract action. Notification of this adoption was made in the *Federal Register* publication of October 23, 1981, which also announced the intent to begin contract negotiations with ETSI for water service from Lake Oahe. The 1977 comprehensive environmental impact statement "Water for Energy—Missouri River Reservoirs" (FES 77-43), detailing our overall water marketing program, covers the cumulative environmental effects, and FES 81-26 evaluates the specific ETSI project. We believe these studies constitute adequate NEPA compliance for the ETSI project.

The Environmental Assessment and Finding of No Significant Impact dated June 10, 1982, and signed by Colonel V. D. Stipo, District Engineer, Corps of Engineers, covering the proposed issuance of Department of the Army permits to ETSI under section 10 of the River and Harbor Act and section 404 of the Clean Water Act, for construction of a water intake structure

in Lake Oahe, Missouri River mile 1081.50R, are enclosed as additional NEPA compliance documentation for your consideration. To the extent that the overall analysis of impacts contained in the environmental assessment is relevant to the impacts associated with this proposed contract, it is adopted as updated and supplemental information to FES 77-43 and FES 81-26.

The Corps of Engineers' environmental assessment covers ETSI's application for an intake structure capable of pumping 54,300 acre-feet per year; however, it should be noted that the Bureau of Reclamation's proposed contract is for 20,000 acre-feet per year only and while the intake structure can ultimately handle more than 20,000 acre-feet per year, additional NEPA compliance by the Bureau of Reclamation would be required before it could enter into contracts for additional water for industrial use by ETSI. The Corps' environmental assessment concludes that neither the site-specific or downstream impacts of the Corps' actions are significant. Also, enclosed for your use and consideration are the Findings of Fact made by the Corps concerning the ETSI permit.

Concurrently with the *Federal Register* notice covering contract negotiations, a news release regarding the proposed contract was made from the regional office in Billings, Montana, to all major newspapers and radio and television stations throughout the Upper Missouri Region. The notice and news releases also announced a public meeting was to be held in Pierre, South Dakota, on November 24, 1981. The temporary furloughing of Federal employees on November 23, 1981, resulted in cancellation of that meeting, but it was rescheduled for December 10, 1981.

The coal slurry pipeline project as proposed by ETSI has been covered by media at the local, regional, and national levels for several years. Significant public interest was expected and received. About 40 copies of the draft contract were sent to interested parties before the public

meeting and about 50 more copies were distributed at the meeting. The format of the December 10 public meeting included an introduction on the purpose of the meeting, a background statement on the industrial water marketing program, and a summary of the draft contract, followed by a question and answer session. Those persons desiring to make a statement at the meeting were given the opportunity. Written statements were requested for the record, and the record for receipt of statements was officially open until January 10, 1982. Comments received through January 27, 1982, were included, however. Attached is a summary of the comments along with the applicable response.

3. *Contracting Entity and Legal Considerations*: ETSI, the official contractor, is a general partnership formed under the laws of the State of Delaware as shown below:

Partner	Percent of Ownership
Overseas Bechtel, Inc.	30
ARCO Transportation, Inc.	25
Slurco Corporation	20
Texas Eastern Slurry Transport Co.	20
Lehman Realty Corporation	5

ETSI was formed for the purpose of constructing, operating, and maintaining the proposed coal slurry pipeline project. This includes contracting for the water needs and construction of water pipeline facilities, contracting with coal suppliers, and contracting with the ultimate coal users at the coal slurry delivery points.

The Field Solicitor, Billings, Montana, and the Office of the Solicitor, Washington, D.C., have reviewed the proposed contract and find it legally sufficient. ETSI is considered to be an acceptable legal entity to contract with the United States. ETSI officials accepted the draft contract on February 23, 1982.

As provided by section 9(c)(2) of the Reclamation Project Act of 1939, we have concluded that the proposed

contract will not impair the irrigation efficiency of Oahe Reservoir, which is an integral part of the Pick-Sloan Missouri Basin Program (P-SMBP). As pointed out in the Solicitor's opinion of November 27, 1974, "Where because of changed circumstances it is not feasible to market, within the time periods originally contemplated, the amount of water available from the reservoir capacity provided for irrigation and the probable extent of future irrigation, you have not only the authority but, in my opinion, the responsibility as well, to apply that water to another beneficial use, such as municipal and industrial purposes." The proposed contract would provide for that interim beneficial use of the water while it is not being used for irrigation purposes.

That same opinion concluded that the decision as to whether it would be more beneficial to use the water for municipal and industrial purposes rather than for the supplemental generation of hydroelectric power would be a matter of sound administrative discretion. Officials of the Western Area Power Administration of the Department of Energy, expressed concern that the proposed water deliveries should not increase firm power rates or affect power availability. It is our position that revenues from the sale of water can be used to purchase replacement power where required by contractual obligations with power customers and where the need for such purchase can be demonstrated.

4. *Background:* Administrative procedures to handle industrial water marketing from the reservoirs built by the Corps of Engineers on the mainstem of the Missouri River were established by the February 24, 1975, Memorandum of Understanding (MOU) executed between the Secretary of the Interior and the Secretary of the Army. The MOU originally encompassed a 2-year term and was last extended through December 31, 1978. The final extension included the Secretary of Energy as a signatory party because of the establishment of the Western Area

Power Administration as the Federal power marketing agency for power generated at federally constructed hydropower facilities of the P-SMBP.

The water being provided for industrial use from the main-stem reservoirs is limited to 1 million acre-feet destined for future Federal irrigation units of the P-SMBP which are not scheduled for development for periods of 40 years or longer. The Solicitor's opinion of November 27, 1974, concluded that the Secretary of the Interior has authority to market such water for interim industrial purposes. The MOU established administrative procedures among the Federal Executive Departments involved with managing the main-stem dams and reservoirs and facilities of the P-SMBP. The administrative procedures, as set forth by our memorandum of November 5, 1980 (copy attached), are being followed even though the MOU has not been further extended or renewed.

In a special session on September 24, 1981, South Dakota enacted legislation to allow the ETSI project to proceed under State law. That legislation provided for issuance of a water permit to the South Dakota Conservancy District, the issuance of State revenue bonds to assist in financing the ETSI water pipeline, and the establishment of a water development fund. A contract was subsequently signed on December 23, 1981, among the State of South Dakota, the South Dakota Conservancy District, and ETSI. That contract provides for assignment of the water permit to ETSI, payments by ETSI into the State's water development fund, and agreement by ETSI not to use the Madison Formation aquifer for its coal slurry project. Governor William Janklow was the principal negotiator for South Dakota.

The South Dakota Water Management Board held three hearings on the water permit application. The water permit was granted to the South Dakota Conservancy District on February 4, 1982, and assigned to ETSI on February 9, 1982. The first payment of $2 million to

the water development fund by ETSI was made on February 11, 1982. The water permit and assignment document are attached to and made a part of the proposed contract.

Basically, South Dakota interests in providing Lake Oahe water for the ETSI project are: (1) The use of water from Oahe Reservoir removes the threat to western South Dakota communities that the Madison Formation aquifer would be overdrafted by ETSI; (2) Upon development of an acceptable contract for water service, communities and rural water users in western South Dakota will be allowed to obtain water from the ETSI waterline, thus providing water to an area of the State which has been without a good water source; and (3) South Dakota would receive substantial annual payments from ETSI for its water development fund to finance future water projects.

The attached letters from Governor William Janklow and the Speaker of the South Dakota House of Representatives demonstrate the endorsement of the proposed contract by South Dakota officials.

The Department's final action on the proposed contract will not be without controversy and opposition. States downstream of South Dakota, (Iowa, Nebraska, and Missouri) have expressed opposition to the proposed contract. These States have enjoyed the flood control and navigation benefits of a controlled Missouri River and now wish to continue this benefit. Even though the impact of providing water service to ETSI would be insignificant downstream, the Lower Basin States see the contract as a forerunner of other diversions. Opposition also has been expressed by the Indian tribes who continue to assert that their water rights should be quantified before any major use of water is allowed. Railroad interests are opposed to coal slurry projects on the basis that they have capacity to haul the coal. Environmental groups are opposed to diverting water out of the Missouri River Basin, to the coal slurry process as being untested,

and have also attacked the integrity of Bechtel Corporation, the major partner in the ETSI project.

We believe these arguments are not supportable. For example, the Bureau's water marketing program is currently limited to 1 million acre-feet, as covered by the 1977 comprehensive environmental impact statement, "Water for Energy—Missouri River Reservoirs." That study concluded that water use probably would not exceed 500,000 acre-feet annually because of other limiting factors such as air quality, social constraints, etc. Slurry pipeline transport of coal was one of the alternatives included in the scenarios developed to evaluate the cumulative environmental effects of the industrial activities stemming from the proposed water diversions.

Interior's water availability determination of February 24, 1975, and concurred with by the Corps of Engineers, was made following an intensive review of the water supply and other issues by representatives of the ten Missouri River Basin States. The Ad Hoc Committee Report dated July 1, 1974, shows that the States agreed that as much as 3 million acre-feet could be made available for the possible industrial undertakings. Copies of each of these documents are attached.

We believe the 1977 environmental study, the more recent BLM environmental statement, and the Corps' environmental assessment and Finding of No Significant Impact adequately cover the cumulative and site-specific environmental impacts associated with the proposed water use. We believe that there is no justification to deny the project because of adverse environmental effects. The concerns voiced by the railroad interests, and the Lower Basin States, are primarily political and social and need to be considered in light of the Upper Basin interests. For example, South Dakota gave up in excess of 500,000 acres for the construction of the main-stem dams and reservoirs and has received none of the Federal irrigation

development proposed to utilize storage water from these reservoirs. A contract provision that makes ETSI's rights to the use of water subservient to adjudicated water rights of the Indian Tribes in the area should adequately protect the interests of the Indian people.

5. *Contract Negotiations, Terms, and Conditions*: The proposed form of contract has been patterned after the forms of contracts approved for use with Basin Electric Power Cooperative and ANG Coal Gasification Company for industrial water service from Lake Sakakawea in North Dakota. These prior contracts were executed on December 28, 1978, and November 9, 1979, for up to 19,000 and 17,000 acre-feet of annual water service, respectively. These contracts, as well as the proposed contract with ETSI, contain provision that water use priority may be junior to claims and rights of the Missouri River Basin Indian Tribes when such claims and rights are adjudicated.

The term of the contract is 40 years with provision for renewal. It includes all the standard articles applicable to this type of contract. The proposed contract provides that satisfaction of South Dakota water law and permit requirements are a condition precedent to completing the contract.

Under the proposed contract, ETSI would receive an annual water entitlement for the beneficial use of up to 20,000 acre-feet for industrial purposes, including coal processing and preparation operations. ETSI obtains no holdover storage rights in Oahe Reservoir and may dispose of its interest in the contract only by assignment and approval of that assignment by the contracting officer. Water measurement would be required, and all facilities required for the diversion and beneficial use of the water would be non-federally funded and constructed. Also, ETSI must secure all easements, permits, licenses or leases for construction of diversion or pumping facilities on reservoir lands from the Corps of Engineers.

Concepts including the cost of purchasing replacement power from coal-fired, steam-electric generating plants and Federal debt servicing costs were used to establish the contract rate. The latter approach uses the assigned irrigation costs in the three main-stem reservoirs (Fort Peck, Garrison, and Oahe) to obtain the net cumulative unpaid balance at the interest rate in effect for 10-year United States Treasury Securities from the time the main-stem system investment became operational in the early 1960's through 1981. Under either approach, a water rate of about $30 per acre-feet can be supported.

The proposed contract provides for preservice (prior to project operation) and full water service charges, both subject to review and adjustment in calendar year 1985 and at 5-year intervals thereafter. The initial full water service charge is $30 per acre-foot and the preservice charge is 10 percent of that amount or $3 per acre-foot for the full 20,000 acre-foot entitlement. The preservice charge may be credited toward payment of the full service charge only in the year that water is first used. The time period for preservice payments is limited to 10 years or when the project becomes operational, whichever occurs first.

Annual operation and maintenance (O&M) costs incurred by the Bureau and the Corps of Engineers to make water deliveries are expected to be less than $2 per acre-foot, including the prorata share of the O&M costs of the mainstem reservoirs that are assigned to irrigation. Revenues would be credited toward paying these annual costs and any remainder would be credited toward repayment of specific irrigation cost assignments in the main-stem reservoirs. Following the payment of the specific irrigation cost assignments, the revenues would be used in conjunction with surplus power revenues to repay other reimbursable costs of the P-SMBP.

6. *Findings and Recommendations*: All prerequisites required to allow the water delivery to ETSI to proceed

under South Dakota law have been completed. The Governor of South Dakota, the South Dakota Legislature, and water users who stand to benefit from water deliveries in western South Dakota are solidly behind the proposed contract action. Review of the proposed contract in behalf of the Department of Energy was made by the Area Manager, Western Area Power Administration, Billings, Montana. The Secretary of the Army has been advised of the proposed contract so that the Corps of Engineers can retain operational and managerial control over the reservoir. Approval of the proposed contract will not be without public controversy. Opposition from the railroad interests, Indian tribes, States downstream of South Dakota, and certain environmental and special interest groups has been expressed and such expressions are expected to continue.

We believe the proposed contract is in the mutual best interests of the United States, the State of South Dakota, and ETSI, and we recommend that you approve the form of contract designated "UM Draft, Revised 3-3-82," with the understanding that minor contract revisions can be made, as necessary, to complete the contract for execution. Thereafter, pursuant to existing delegations of authority and after execution by ETSI officials, the Regional Director, Upper Missouri Region, will execute the contract in behalf of the United States and serve as contracting officer.

7. *Urgency of Approval*: The development of the ETSI coal slurry pipeline project has involved a number of years of intensive planning. According to ETSI officials, the water service contract is of utmost importance to its schedule to begin construction of the project. The standby service charge of $3 per acre-foot represents an annual sum to the United States of $60,000, or about $164 per day. Upon completion of the project, this

charge will increase to an annual amount of at least $600,000 per year.

/s/ R. N. Broadbent

Attachments

Approved:

/s/ James G. Watt — Jun. 29, 1982
Secretary of the Interior — Date

bc: Secretary's Surname
Secretary's Reading Files—LBR (2)
AS/LW (2)
Associate Solicitor—Energy and Resources
Chief, Division of O&M Technical Services, E&R Center
Regional Director, PN, MP, UC, LC, SW, UM, LM
Field Solicitor, Billings, Montana
W.O. Code 140
(w/o attachments)

RO Draft Revised
LBR:SSmith/FEEllis:1t:4/27/82:x35671
Revised:LBR:SSmith:1t:5/17/82:x35671
Revised:LBR:LMauro/AJones:1t:6/18/82:x35671
VReg/A8-15

ADMINISTRATIVE RECORD 900331

Duplicate Original
Contract No. 2-07-60-WS126

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Pick-Sloan Missouri Basin Program

INDUSTRIAL WATER SERVICE CONTRACT BETWEEN THE UNITED STATES AND ETSI PIPELINE PROJECT, A JOINT VENTURE

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Duplicate Original
Contract No. 2-07-60-WS126

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Pick-Sloan Missouri Basin Program

INDUSTRIAL WATER SERVICE CONTRACT BETWEEN THE UNITED STATES AND ETSI PIPELINE PROJECT, A JOINT VENTURE

THIS CONTRACT, Made this 2nd day of July, 1982, pursuant to the Reclamation Act of 1902 (32 Stat. 388) and acts amendatory thereof and supplementary thereto, particularly Section 9(c) of the Act of August 4, 1939 (53 Stat. 1187), and the Flood Control Act of December 22, 1944 (58 Stat. 887), between the UNITED STATES OF AMERICA, hereinafter called the United States, acting for this purpose through the officer executing this contract, hereinafter called the Contracting Officer, and the ETSI PIPELINE PROJECT, A JOINT VENTURE, with its principal place of business at San Francisco, California, hereinafter called ETSI or the Contractor;

WITNESSETH:

WHEREAS, the following preliminary statements are made by way of explanation:

a. The United States, through its Corps of Engineers, has constructed and is operating the Oahe Dam and Reservoir in South Dakota (said reservoir being hereinafter called Lake Oahe) pursuant to Section 9 of the Flood Control Act of December 22, 1944.

b. ETSI is planning the construction and operation of a coal slurry pipeline from the Powder River Basin in Wyoming to serve electric utilities in the middle south-

ern states. The Contractor is in need of approximately 20,000 acre-feet of water annually as a coal transportation medium.

c. ETSI has secured assignment of the necessary conditional water permit from the South Dakota Conservancy District, covering an annual diversion for up to 50,000 acre-feet of water from Lake Oahe. Perfection of this water permit is a condition precedent for this contract. ETSI intends to request an additional water service contract from the United States as plans are developed to utilize the full 50,000 acre-feet of water per year covered in the water permit assigned from the South Dakota Conservancy District.

d. The Secretary of the Interior, hereinafter called the Secretary, and the Secretary of the Army have agreed that water service to industrial users can be provided out of the main stem reservoirs of the Missouri River, including Lake Oahe. The Secretary, after consultation with the Secretary of the Army, has determined that providing water service for industrial water use to ETSI for 20,000 acre-feet of water annually will not impair the efficiency of the project for irrigation, interfere with the operation of the project for flood control, nor adversely affect existing uses of water, and is a beneficial consumptive use of water.

e. The Bureau of Land Management, as designated lead agency for the Department of the Interior, has completed studies and filed the Final Environmental Statement (FES 81-26) dated July 1981 on the ETSI, Coal Slurry Pipeline Transportation Project pursuant to the National Environmental Policy Act of 1969 covering the effect on the environment of the construction and operation of facilities planned by ETSI. The Bureau of Land Management approved the project by record of decision dated January 14, 1982. The Department of the Interior's 1977 Comprehensive Environmental Impact

Statement, "Water for Energy—Missouri River Reservoirs" covering the Bureau of Reclamation's overall water marketing and the site-specific final environmental statement prepared by the Bureau of Land Management (81-26), constitute adequate National Environmental Policy Act compliance.

NOW, THEREFORE, in consideration of the premises and the mutual promises of the parties, it is agreed as follows:

BASIC CONDITIONS TO WATER SERVICE UNDER THIS CONTRACT

1. A condition precedent for this contract is the assignment of the water permit for energy industry use as authorized by Special Session of the South Dakota Legislature on September 24, 1981. This contract shall not be construed to extend to any water the diversion of which is not authorized by either South Dakota law or the State water permit. Should this water permit be forfeited or terminated for any cause by the State of South Dakota, this contract shall also be subject to termination. The above-described State water permit attached hereto is incorporated by reference.

TERM OF CONTRACT

2. This contract shall be effective on execution and shall continue for a term of 40 years unless sooner terminated under the provisions of this contract: *Provided*, That conditional upon the availability of water, the Contractor shall have the option to renew this contract pursuant to the Act of June 21, 1963 (77 Stat. 68; 43 U.S.C. 485h, note).

PERMITS FOR CONSTRUCTION AND MAINTENANCE

3. The Contractor shall secure from the Corps of Engineers all needed permits for the construction of diver-

sion or pumping facilities on lands under jurisdiction of the Corps, and all permits required under Section 10 of the Act of March 3, 1899 (30 Stat. 1152; 33 U.S.C. 407), or under Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (86 Stat. 884; 33 U.S.C. 1344), in accordance with applicable regulations of the Secretary of the Army and the Corps of Engineers which may be in effect at the time of grant of an easement, permit, license, or lease: *Provided*, That such instruments will be subject to existing rights and the installation or installations by the Contractor shall be in accordance with plans approved by the Corps of Engineers and the Contracting Officer. It is further recognized that this contract or any subsequent instrument in connection therewith does not grant to the Contractor the right of access to the waters of Lake Oahe or to the Federal land adjoining for any purpose other than to make annual industrial use of 20,000 acre-feet of water service referred to in this contract.

. . . Explanatory Recitals
Article 1, 2, 3

INDIAN WATER RIGHTS—AVAILABILITY OF WATER

4. a. The parties to this contract acknowledge that American Indian Tribes claim prior and paramount rights to the use of large quantities of water within the Missouri River Basin. Accordingly, this agreement is subject and subordinate to any claims of the Missouri River Basin Indian Tribes for reserved rights to the use of water which are adjudicated and have been found to constitute a prior right by a final and nonappealable order of a court of competent jurisdiction.

b. During the term of this contract, and subject to conditions prescribed in Articles 1 and 4.a., and subject to any preexisting rights, the United States shall permit the Contractor to divert up to 20,000 acre-feet of water

annually from Lake Oahe in South Dakota for transport to the Powder River Basin in Wyoming and subsequently as the transportation medium in the coal slurry pipeline project. Water so diverted shall be in accordance, so far as possible, with schedules delivered by the Contractor to the Contracting Officer 90 days in advance of the proposed diversion of water. The Contractor will pay for such water service as provided below in Article 5.

c. The water furnished hereunder will be put to a beneficial use by the Contractor for industrial purposes and other uses incidental thereto, including coal processing and preparation operations. The Contractor will have no holdover storage rights in Lake Oahe. No sale, gift, delivery, or other disposition of the whole or any part of the 20,000 acre-feet of water to be made available annually by the United States will be delivered by the Contractor to third parties otherwise than by assignment of the Contractor's interest in this contract, as provided for in Standard Provision J of Exhibit A.

d. After water diversions have been made under this contract for a sufficient period of time for the Contractor to determine the definitive needs of the coal slurry pipeline project, the Contractor may request and the Contracting Officer will grant a reduction in the amount of water to be made available under Article 4b above if such reduction is made possible because of the Contractor's increased water use efficiency or because of the original overestimation of water needs. In the case of reductions in water entitlement, an appropriate and proportionate change will be made in the future payments required under Article 5 below. A reduction in the entitlement authorized under State water permit shall automatically reduce the amount of water to be made available under this water service contract.

RATE AND METHOD OF PAYMENT FOR WATER

5. a. The Contractor shall pay an annual preservice charge or full water service charge to the United States

for the water service entitlement provided under provisions of this contract. The preservice charge shall apply from the date of execution of this contract to the end of the construction period for the Contractor's proposed coal slurry project or 10 years, whichever is earlier. The full water service charge shall apply beginning with the tenth anniversary date of this contract or such earlier date as determined above.

Article 4
Article 5 . . .

b. Upon execution of this contract and on each yearly anniversary date thereafter when the preservice charge is applicable under provisions of this contract, the Contractor shall pay to the United States an annual preservice charge of 10 percent of the effective full water service charge times the 20,000 acre-feet of water proposed for diversion. The preservice charge provided herein shall be increased to a full water service charge under conditions set out in subparagraphs a and c of this Article 5. Should this contract be terminated for any cause by either the United States or the Contractor, all preservice charges paid to the United States by the Contractor shall become property of the United States.

c. The full water service charge from the effective date of this contract to the same date in 1985 shall be at the annual rate of $30 per acre-foot of water in full service status. Thereafter, and for each successive 5-year period, the water rate per acre-foot may be adjusted by the Contracting Officer in accordance with the then current rate-setting policies applicable to the Pick-Sloan Missouri Basin Program. Payment of the full water service charge shall be made in advance, on or before each anniversary date during the term of this contract when the full water service charge is applicable: *Provided*, That where water is used for construction purposes or for testing of pipeline facilities prior to initial diversions for project operation, a charge for each acre-foot used shall be paid to the

United States by the Contractor at the prevailing full service rate: *Provided further*, That during the periods when preservice charges are applicable and where a partial year of water service is provided for initial plant operation because of termination of the contract or any other reason, the Contractor shall pay the United States for actual water service provided at the prevailing full service rate per acre-foot of water used during such partial year of water service.

d. Nothing in this contract shall be construed to limit the State of South Dakota from assessing fees or charges for water appropriated by the Contractor pursuant to the State water permit referenced in Article 1.

WATER MEASUREMENT AND RESPONSIBILITY FOR DISTRIBUTION

6. a. Water diverted in accordance with Article 4 hereof will be measured by a metering device satisfactory to the Contracting Officer, installed, operated and maintained by the Contractor as required by the Contracting Officer and be accessible for inspection at all reasonable times by proper representatives of the United States.

b. All facilities required for the diversion and use of the water referred to in this contract shall be installed, operated and maintained at no expense to the United States. The Contractor shall hold the United States, its officers, agents, and employees harmless from any and all damages which may in any manner result from the operations of the Contractor in the diversion, use, or disposal of the water being provided under this contract.

. . . Article 5
Article 6

TERMINATION OF CONTRACT

7. a. Except as provided in Article 8 below, upon the failure of the Contractor to perform any of its obligations under this contract, the United States may give notice to

the Contractor in writing of the nature of its default and require the Contractor within a period specified in such notice, but not less than ninety (90) days, to correct its failure in compliance and upon Contractor's failure so to do, may terminate this contract or, at his/her sole election, the Contracting Officer may withhold water under the terms hereof until the Contractor complies with the terms of the contract. The Contractor shall have the right to terminate this contract in the event it has no further need for the water service contemplated by the terms herein.

b. If by the tenth anniversary date of this contract, the Contractor has not shown evidence that substantial construction is underway for the coal slurry project facilities proposed to utilize the water service herein provided, this contract may be terminated by the Contracting Officer upon giving 90 days' advance notice in writing to the Contractor.

c. Termination of this contract for any cause by either the United States or the Contractor shall not relieve the Contractor of any obligations incurred by way of this contract prior to termination.

UNCONTROLLABLE FORCES

8. Neither party shall be considered to be in default in respect to any obligation hereunder, if prevented from fulfilling such obligation by reason of uncontrollable forces, the term "uncontrollable forces" being deemed, for the purposes of this contract, to mean any cause beyond the control of the party affected, including, but not limited to, drought, failure of facilities, flood, earthquake, storm, lightning, fire, epidemic, war, riot, civil disturbance, labor disturbance, sabotage, and restraint by court or public authority, which by exercise of due diligence and foresight, such party could not reasonably have been expected to avoid. Either party rendered unable to fulfill any obligation by reason of uncontrollable forces shall

exercise due diligence to remove such inability with all reasonable dispatch.

CONFORMANCE TO STATE LAWS AND POLICIES

9. Nothing contained in this contract shall be construed to abridge, limit, deprive, or interfere with such rights as the State of South Dakota or any agency thereof now have either to the water subject to this contract, or to adopt such policies and enact such other laws as South Dakota deems necessary with respect to subject waters.

STANDARD CONTRACT PROVISIONS

10. This contract is subject to Standard Contract Provisions listed below and attached as Exhibit A which by this reference is made a part of this contract.

A. Charge for Late Payments

B. Contingent on Appropriation or Allotment of Funds

C. Books, Records and Reports

D. Title VI, Civil Rights Act of 1964

Article 7, 8, 9
Article 10 . . .

E. Quality of Water

F. Water and Air Pollution Control

G. Water Availability and Shortages

H. Rules, Regulations, and Determinations

I. Officials Not to Benefit

J. Assignment Limited—Successors and Assigns Obligated

K. Equal Opportunity

L. Water Conservation Program

NOTICES

11. Any notice, demand, or request authorized or required by this contract shall be deemed to have been given, on behalf of the Contractor, when mailed, postage prepaid, or delivered to the Regional Director, Upper Missouri Region, Bureau of Reclamation, P.O. Box 2553, Billings, MT 59103, and on behalf of the United States, when mailed, postage prepaid, or delivered to the ETSI Pipeline Project, A Joint Venture, P.O. Box 7598, San Francisco, CA 94120. The designation of the addressee or the address may be changed by notice given in the same manner as provided in this article for other notices.

IN WITNESS WHEREOF, the parties hereto have signed their names, the day and year first-above written.

UNITED STATES OF AMERICA

By /s/ Joseph B. Marcotte, Jr.
Regional Director
Upper Missouri Region
Bureau of Reclamation

ETSI PIPELINE PROJECT,
A JOINT VENTURE

By /s/ Wesley Witten

Title President

EXHIBIT A

A. CHARGE FOR LATE PAYMENTS

The Contractor shall pay a late payment charge on installments or charges which are received after the due date. The late payment charge percentage rate calculated by the Department of the Treasury and published quarterly in the *Federal Register* shall be used: *Provided*, That the late payment charge percentage rate will not be less than 0.5 percent per month. The late payment charge percentage rate applied on an overdue payment will remain in effect until payment is received or a different rate is published. The late payment rate for 30-day period will be determined on the day immediately following the due date and will be applied to the overdue payment for any portion of the 30-day period of delinquency. In the case of partial late payments, the amount received will first be applied to the late charge on the principal and then to payment of the principal.

B. CONTINGENT ON APPROPRIATION OR ALLOTMENT OF FUNDS

The expenditure or advance of any money or the performance of any work by the United States hereunder which may require appropriation of money by the Congress or the allotment of funds shall be contingent upon such appropriation or allotment being made. The failure of the Congress to appropriate funds or the absence of any allotment of funds shall not relieve the Contractor from any obligations under this contract. No liability shall accrue to the United States in case such funds are not appropriated or allotted.

C. BOOKS, RECORDS, AND REPORTS

The Contractor shall establish and maintain accounts and other books and records pertaining to its financial transactions, land use and crop census, water supply, water use,

changes of project works, and to other matters as the Contracting Officer may require. Reports thereon shall be furnished to the Contracting Officer in such form and on such date or dates as he may require. Subject to applicable Federal laws and regulations, each party shall have the right during office hours to examine and make copies of each other's books and records relating to matters covered by this contract.

D. TITLE VI, CIVIL RIGHTS ACT OF 1964

1. The Contractor agrees that it will comply with Title VI of the Civil Rights Act of July 2, 1964 (78 Stat. 241), and all requirements imposed by or pursuant to the Department of the Interior Regulation (43 CFR 17) issued pursuant to that title, to the end that, in accordance with Title VI of that Act and the Regulation, no person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Contractor receives financial assistance from the United States and hereby gives assurance that it will immediately take any measure to effectuate this agreement.

2. If any real property or structure thereon is provided or improved with the aid of Federal financial assistance extended to the Contractor by the United States, this assurance obligates the Contractor or in the case of any transfer of such property, any transferee for the period during which the real property or structure is used for a purpose involving the provision of similar services or benefits. If any personal property is so provided, this assurance obligates the Contractor for the period during which it retains ownership or possession of the property. In all other cases, this assurance obligates the Contractor for the period during which the Federal financial assistance is extended to it by the United States.

3. This assurance is given in consideration of and for the purpose of obtaining any and all Federal grants, loans, contracts, property, discounts, or other Federal financial assistance extended after the date hereof to the Contractor by the United States, including installment payments after such date on account of arrangements for Federal financial assistance which were approved before such date. The Contractor recognizes and agrees that such Federal financial assistance will be extended in reliance on the representations and agreements made in this assurance, and that the United States shall reserve the right to seek judicial enforcement of this assurance. This assurance is binding on the Contractor, its successors, transferees, and assignees.

E. QUALITY OF WATER

The operation and maintenance of project facilities shall be performed in such manner as is practicable to maintain the quality of raw water made available through such facilities at the highest level reasonably attainable as determined by the Contracting Officer. The United States does not warrant the quality of water and is under no obligation to construct or furnish water treatment facilities to maintain or better the quality of water.

F. WATER AND AIR POLLUTION CONTROL

The Contractor, in carrying out this contract, shall comply with all applicable water and air pollution laws and regulations of the United States and the State of South Dakota and shall obtain all required permits or licenses from the appropriate Federal, State, or local authorities.

G. WATER AVAILABILITY AND SHORTAGES

1. The United States will not be responsible for the control, carriage, handling, use, disposal, or distribution

of water furnished the Contractor hereunder, and the Contractor will hold the United States and its officers, agents, and employees harmless on account of damage or claim of damage of any nature whatsoever arising out of or connected with the control, carriage, handling, use, disposal, or distribution of water by the Contractor.

2. The United States shall not be responsible for the maintenance of any particular water level in order to permit the Contractor to take water therefrom through the facilities which the Contractor installs. Payments shall be due and payable as provided in Article (5), irrespective of the Contractor ability or inability to take water.

3. On account of uncontrollable force, there may occur in any year a shortage in the total annual quantity of water available for furnishing to the Contractor by the United States pursuant to the contract. In no event shall any liability accrue against the United States or any of its officers, agents, or employees for any damage direct or indirect arising from such shortages. In the case of such shortage, an appropriate reduction shall be made in the water service charge for that year.

H. RULES, REGULATIONS, AND DETERMINATIONS

1. The Contracting Officer shall have the right to make, after an opportunity has been offered to the Contractor for consultation, rules and regulation and the State of South Dakota to add or to modify them as may be deemed proper and necessary to carry out this contract, and to supply necessary details of its administration which are not covered by express provisions of this contract. The Contract shall observe sucl rules and regulations.

2. Where the terms of this contract provide for action to be based upon the opinion or determination of either

party to this contract, whether or not stated to be conclusive, said terms shall not be construed as permitting such action to be predicated upon arbitrary, capricious, or unreasonable opinions or determinations. In the event that the Contractor questions any factual determination made by the Contracting Officer, the findings as to the facts shall be made by the Secretary only after consultation with the Contractor and shall be conclusive upon the parties.

I. OFFICIALS NOT TO BENEFIT

1. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom. This restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

J. ASSIGNMENT LIMITED—SUCCESSORS AND ASSIGNS OBLIGATED

The provisions of this contract shall apply to and bind the successors and assigns of the parties hereto, but no assignment or transfer of this contract or any part of interest therein shall be valid until approved by the Contracting Officer.

K. EQUAL OPPORTUNITY (FEDERAL CONSTRUCTION)

During the performance of this contract, the Contractor agrees as follows:

1. The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, or

national origin. Such action shall include, but not be limited to, the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this nondiscrimination clause.

2. The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without discrimination because of race, color, religion, or national origin.

3. The Contractor will send to each labor union or representative of workers, with which it has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the Contracting Officer, advising the labor union or workers' representative of the Contractor's commitments under Section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

4. The Contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended, and of the rules, regulations, and relevant orders of the Secretary of Labor.

5. The Contractor will furnish all information and reports required to said amended Executive Order by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to its books, records, and accounts by the Contracting Officer and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

6. In the event of the Contractor's noncompliance with the nondiscrimination clause of this contract or with any of the such rules, regulations, or orders, this contract may be canceled, terminated, or suspended, in whole or in part, and the Contractor may be declared ineligible for further government contracts in accordance with procedures authorized in said amended Executive Order, and such other sanctions may be imposed and remedies invoked as provided in said Executive Order, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

7. The Contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of said amended Executive Order, so that such provisions will be binding to each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such programs, including sanctions for noncompliance: *Provided, however,* That in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

L. WATER CONSERVATION PROGRAM

While the contents and standards of a given water conservation program are primarily matters of State and local determination, there is a strong Federal interest in developing an effective water conservation program because of this contract. The Contractor shall develop and implement an effective water conservation program for all uses of water which is provided from, or conveyed through, federally constructed or federally financed fa-

cilities. That water conservation program shall contain definite goals, appropriate conservation measures, and time schedules for meeting the water conservation objectives.

A water conservation program, acceptable to the Contracting Officer, shall be in existence prior to one or all of the following: (1) service of federally stored/conveyed water; (2) transfer of operation and maintenance of the project facilities to the Contractor; or (3) transfer of the project to an operation and maintenance status. The distribution and use of federally stored/conveyed water and/or the operation of program facilities transferred to the Contractor shall be consistent with the adopted water conservation program. Following execution of this contract, and at subsequent 5 year intervals, the Contractor shall submit the water conservation plan to the Contracting Officer for review and approval. After review of the results of the previous 5 years and after consultation with the Contractor, the Contracting Officer may require modifications in the water conservation program to better achieve program goals.

No. 1791-7

Map No. 1545-Z Water District No. 2
Lower Cheyenne District

Above for Office Use

APPLICATION FOR PERMIT

To Appropriate Water within the State of South Dakota

Check one of the following:

New X Vested Right —— Future Use ——
Change in Diversion —— Additional Diversion ——
Change in Acreage —— Additional Acreage ——

1. Name of Applicant South Dakota Conservancy District Phone No. 773-3151
   Post Office Address Foss Building, Pierre State South Dakota 57501
   If a corporation show date and place of incorporation ——————
2. Method of accomplishing work (contract, employment of others, or by direct labor) contracts
3. Name of diversion work West River Aqueducts
4. Amount of water claimed (cubic feet per second) 50,000 acre-feet annually
5. Source of water supply Missouri River—Oahe Reservoir storage
6. Location of point of diversion Along West shoreline of the Oahe Resevroir somewhere between the two shoreline points located in SW 1/4 of section 31, T7N, R29E and NW 1/4 of section 31, T6N, R31E, County Stanley
7. Annual period or periods during which water is to be used continuously

8. Use to be made of water, (irrigation, industrial, municipal, commercial, recreation, etc.) Energy industry use

9. For irrigation use. Total number of acres to be irrigated ————————

List below each forty acre subdivision, or lot, or fraction thereof and show number of acres to be irrigated in each

Attach sheet if more space is needed

10. Time required to complete construction of water supply system 10 years. Additional time required to complete application of water to the proposed beneficial use 0 years.

11. Choice of county newspaper for publication of Notice of Intent to Appropriate Water Fort Pierre Times-Capitol Journal-Pierre Argus Leader-Sioux Falls Journal-Rapid City

12. Principal Features of the Proposed Water Supply System.

A. Works proposed to divert water from its natural source.
Intake pump station

B. Works proposed to transport water to place of use.

Buried pipeline with necessary booster pump stations, controls, powerlines, and appurtenances. (Reference: Environmental Impact Statement, ETSI, Bureau of Land Management)

C. Works proposed to apply water to beneficial use. Coal slurry pipelines and other energy industry use beginning in the Powder River Basin, Wyoming.

Estimated Total Cost $250,000,000 per aqueduct.

Attachments: Attach Form 2A if diversion from a well or dugout, or if storage of water, is proposed. Attach map.

(see instructions concerning preparation.)

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

I, Robert L. Helmer, the applicant, certify that I have read the foregoing application and have examined the attached map and that the matters therein stated are true and that I intend and am able to complete the necessary construction.

/s/ Robert L. Helmer
Subscribed and sworn to before me this 25th day of September 19—.

/s/ [Illegible]
Notary Public (or other qualified officer).

WNR-802-7/79

WATER RIGHT APPLICATION APPROVAL

The Water Management Board hereby approves Water Right Application No. 1791-2, South Dakota Conservancy District, Foss Building, Pierre, South Dakota 57501 With the following qualifications.

This Permit is approved in accordance with the ETSI contract and Conclusions of Law and Findings of Fact leading to the final decision, and hereby made a part of this permit.

Date of first receipt of application *September 25, 1981*

Date of return to applicant for correction, amendments or changes required ————, 19—

Date of receipt of correction application ————, 19—

Approved *February 4*, 1982, Recorded in Book *22* Page *335*

WATER RIGHT PERMIT NO. 1791-2

The Water Management Board hereby grants and issues this Water Right Permit No. 1791-2 authorizing the construction of the water use system and the putting of water to beneficial use as stated in the Application and as qualified in the Water Right Application approval, subject, however, to the following limitations and conditions:

1. The date from which applicant may claim right is September 25, 1982
2. The equivalent of at least one-fifth of the work above specified is to be completed on or before February 4, 1987
3. The whole of said work is to be completed on or before February 4, 1992
4. The limit of time from proof of beneficial use of water appropriated in accordance herewith is February 4, 1992

5. The water appropriated shall be used for the purpose of Energy Industry Use

6. The prior right of all persons who, by compliance with the laws of the State of South Dakota, have acquired a right to the use of water must not be injuriously affected by this appropriation.

7. The amount of the appropriation herein granted shall not exceed 50,000 acre feet of water annually, neither shall it exceed the capacity of the above described water supply system, nor shall it exceed the amount of water needed for beneficial uses served, and is actually and beneficially used for energy industry use on or before February 4, 1992; said water to be used during the following described annual period: continuously.

Witness my hand this 5th day of February, 1982.

THE WATER MANAGEMENT BOARD

By: /s/ John Hatch
Chief Engineer, Water Rights

Certificate of Construction Issued ————, 19—

Water License Issued ————, 19—

ADDENDUM TO APPLICATION FOR PERMIT TO APPROPRIATE WATER

This application is for a permit to appropriate water for energy industry use for marketing by the South Dakota Conservancy District (District) to Energy Transportation Systems, Inc. (ETSI), a Delaware corporation, a related corporation or entity, or successor in interest to effectuate the terms of a contract or instrument of conveyance to be executed by and between the District and ETSI or such related corporation or entity prior to the approval of the application and issuance of a permit.

ASSIGNMENT AGREEMENT BETWEEN SOUTH DAKOTA CONSERVANCY DISTRICT AND ETSI PIPELINE PROJECT

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

KNOW ALL MEN BY THESE PRESENTS.

That, the SOUTH DAKOTA CONSERVANCY DISTRICT, a political subdivision of the State of South Dakota, in accordance with and subject to the terms and conditions of the Agreement by and among it, the STATE OF SOUTH DAKOTA, ENERGY TRANSPORTATION SYSTEMS, INC. and the ETSI PIPELINE PROJECT, a Joint Venture created as a partnership under the laws of Delaware by and among ARCOAL TRANSPORTATION, INC., BECHTEL PETROLEUM, INC., LEHMAN REALTY CORPORATION, SLURCO CORPORATION and TEXAS EASTERN SLURRY TRANSPORT COMPANY, executed the 23rd day of December, 1981, and for the considerations recited therein, does hereby grant, convey, sell, assign, transfer and set over unto the ETSI PIPELINE PROJECT, its right, title and interest under the permit issued to it by the South Dakota Water Management Board subject to said Agreement, dated the 23rd day of December, 1981, to appropriate fifty thousand (50,000) acre-feet per year of Oahe Reservoir Water, a copy of said permit being attached hereto and incorporated herein by this reference. The SOUTH DAKOTA CONSERVANCY DISTRICT warrants that it has not heretofore assigned or encumbered said permit.

TO HAVE AND TO HOLD the same, to the ETSI PIPELINE PROJECT, and the ETSI PIPELINE PROJECT does hereby assume all obligations imposed under or in connection therewith.

IN WITNESS WHEREOF, the SOUTH DAKOTA CONSERVANCY DISTRICT has caused this assignment to be executed this 9 day of Feb., 1982.

SOUTH DAKOTA
CONSERVANCY DISTRICT

By /s/ Robert L. Helmer
Robert L. Helmer, Chairman
Board of South Dakota
Conservancy District

Acceptance:

ETSI Pipeline Project

By Wesley Witten

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

On this 9th day of February, 1982, before me, the undersigned officer, personally appeared, ROBERT L. HELMER, who acknowledged himself to be the Chairman, of the Board of SOUTH DAKOTA CONSERVANCY DISTRICT, and that he, as such Chairman, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the SOUTH DAKOTA CONSERVANCY DISTRICT by himself as Chairman.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

/s/ [Illegible]
Notary Public, South Dakota

My Commission Expires: 9-20-87
[SEAL]

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

On this the 11th day of February, 1982, before me, the undersigned officer, personally appeared, Wesley Witten, who acknowledged himself to be the President of ETSI PIPELINE PROJECT, and that he, as such President, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of ETSI PIPELINE PROJECT by himself as President.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

/s/ Mary Helen Bisson
Notary Public, South Dakota

My Commission Expires: 1-19-84
[SEAL]

NOTICE OF TRANSFER OF WATER PERMIT

TO: Water Rights Division
Foss Building
Pierre, SD 57501

Date: February 11, 1982

This is to notify you that the title to the lands described as follows: Permit No. 1791-2 for 50,000 acre feet of water annually from the Missouri River-Oahe Reservoir Storage—for Energy Industry Use, formerly owned by the South Dakota Conservancy District has been transferred to ETSI Pipeline Project, P.O. Box 7598, San Francisco, California 94120 together with any rights to the beneficial use of water thereon as evidenced by Water Permit No. 1791-2 as provided for in SDCL 46-5-32.

You are therefore hereby requested to file this "Notice of Transfer of Water Permit" in its appropriate file at the Division of Water Rights, Water Management Board as evidence of the change of ownership.

A fee of Two Dollars and Fifty Cents ($2.50) is hereto attached to cover filing fees as required under SDCL 46-2-13.

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

I, Wesley Witten being first duly sworn on my oath despose and say: That my relation to the above described undertaking is that of Owner, that I have read the above foregoing statement, and I know of my own personal knowledge that the information herein stated is true.

/s/ Wesley Witten
(Signed)

Subscribed and sworn to before me this 11th Day of February, 1982

/s/ Mary Helen Bisson
(Notary Public)
My Commission Expires 1-19-84

WNR-820-7/79
Notice of Transfer of Water Permit

CONSENT TO ACTION OF MANAGEMENT COMMITTEE ETSI PIPELINE PROJECT, A JOINT VENTURE

The undersigned, representing a majority of the partnership interests of ETSI Pipeline Project, A Joint Venture, hereby consent in writing to the following action, effective June 23, 1982.

RESOLVED, that Wesley M. Witten, as President of ETSI Pipeline Project, A Joint Venture, be and hereby is authorized and empowered to enter into an Industrial Water Service Contract for use of the mainstream reservoirs of the Missouri River, including Lake Oahe, with the Upper Missouri Region Bureau of Reclamation, in the name and behalf of this Joint Venture and upon such terms and conditions as may be agreed upon between him and said Bureau of Reclamation.

Date: June 23, 1982

ARCOAL TRANSPORTATION, INC.

/s/ H. E. Bond
By: H. E. BOND

BECHTEL PETROLEUM, INC.

/s/ R. J. Mayman
By: R. J. MAYMAN

TEXAS EASTERN SLURRY
TRANSPORT COMPANY

By: W. H. MCCOLLOUGH

LEHMAN REALTY CORPORATION

By: W. A. SHUTZER

SLURCO CORPORATION

By: J. W. WILSON

ADMINISTRATIVE RECORD 900428

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF RECLAMATION
Upper Missouri Region
P.O. Box 2553
Billings, Montana 59103

IN REPLY
REFER TO: UM-440 Jul. 2, 1982

Mr. Wesley M. Witten, President
ETSI Pipeline Project, A Joint Venture
P.O. Box 7598
San Francisco, CA 94120

Dear Mr. Witten:

On June 29, 1982, Secretary of the Interior James G. Watt approved the form of the contract to provide 20,000 acre-feet of annual water service from Lake Oahe for use in your proposed coal slurry pipeline project.

During the final processing and approval phase in our Commissioner's office, the following minor changes were made in the form of contract.

1. In the preamble, the Act of August 4, 1939 (53 Stat. 1187), was also included as cited authority.

2. In preliminary recital c, in the first sentence "approving its" was changed to "covering an" and "of 20,000" was changed to "for up to 50,000".

3. In preliminary recital e, the last sentence was added.

4. In Article 1, the subscript "a" was omitted since this is only a one-paragraph article.

5. In Article 7b, the first sentence was modified by excluding "begun construction of" and inserting "shown evidence that substantial construction is underway for".

6. In standard provision G2, the number 5 was added to the blank space to clarify that it is Article 5 that is being referenced.

We assume these changes are acceptable to you. For the record, please acknowledge your acceptance by signing in the space provided and returning the duplicate original to this office.

Sincerely yours,

/s/ Joseph B. Marcotte, Jr.
JOSEPH B. MARCOTTE, JR.
Regional Director

In duplicate

Contract changes acceptable

By /s/ Wesley Witten

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE DISTRICT OF NEBRASKA

MOOTNESS EXHIBIT 10

ETSI

ETSI Pipeline Project, A Joint Venture
P.O. Box 2521
Houston, Texas 77252
(713) 759-3131

July 31, 1984

South Dakota Conservancy District
Secretary of the Department of
Water and Natural Resources
Joe Foss Building
Pierre, South Dakota 57501

Re: Agreement for South Dakota Conservancy District to Assign a Water Right to Energy Industry Use to ETSI Pipeline Project ("Agreement"), dated December 23, 1981, among Energy Transportation Systems Inc., ETSI Pipeline Project, the South Dakota Conservancy District and the State of South Dakota, as amended

Gentlemen:

ETSI Pipeline Project, a Joint Venture created as a partnership under the laws of Delaware and now consisting of Northern Coal Pipeline Company, Overseas Bechtel Incorporated, Slurco Corporation and Texas Eastern Slurry Transport Company, hereby cancels the Agreement, pursuant to Article 3.A.2.c(i) thereof, by giving this notice to the South Dakota Conservancy District,

since ETSI may cancel by giving notice under that provision no later than August 8, 1984.

Very truly yours,

ETSI PIPELINE PROJECT

By Northern Coal
Pipeline Company

By /s/ W. A. Henry

By Overseas Bechtel
Corporation

By /s/ John M. Huneke

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543

March 2, 1987

Re: 86-939)—Energy Transportation Systems, Inc. v.
) State of Missouri, et al.
86-941)—Donald P. Hodel, Secretary of the Interior,
) et al. v. State of Missouri, et al.

• • • •

"The motion of petitioner in No. 86-939 to substitute ETSI Pipeline Project as petitioner in place of Energy Transportation Systems, Inc. is granted. The petitions for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument."

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Note: From hereinafter, the caption of the case in No. 86-939, shall be known as: *ETSI Pipeline Project v. State of Missouri, et al.*